THE VALIDITY AND RELEVANCE OF A JURISDICTION CLAUSE IN A CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

– Interpretation of European Union Law with Comparative Elements from National Laws

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Master's thesis
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Jurisdiction issues are an essential part of international agreements, in particular with carriage of goods by sea contracts. What is the competent court to review the dispute in case the cargo has been damaged during the transport is not always evident. There are several norms, both international and national, that affect the selection of the proper forum. In order to avoid confusion in selecting the correct forum, and parallel proceedings, the parties of the carriage contract, the cargo owner and the carrier, may incorporate jurisdiction clauses into their carriage contract to refer a possible dispute to be reviewed by a particular court of law. However, there are several regulations that limit the selection of available jurisdictions in sea transport disputes, such as the Maritime Conventions, national laws and in particular the European Union law. Some of these norms contain mandatory provisions that even the parties of the contract may not derogate from. This is a clear limitation to the party autonomy and a vital issue to be considered in negotiating a carriage of goods by sea contract.

In chapter I, the thesis describes the background of the research and the benefits of including jurisdiction clauses into carriage contracts. The parties are in the best position to evaluate, which court would be the fittest to solve the case. This planning enhances foreseeability in contractual relationships and avoids a possibly costly and lengthy litigation over proper jurisdiction.

Chapter II provides an overview of how different legal systems, civil law and common law, interpret jurisdiction clauses and discusses the laws of two countries, Finland and the United Kingdom. Furthermore, the legal doctrines of *lis pendens* and *forum non conveniens* are discussed in respect to forum clauses and how their application in jurisdiction disputes differ depending on the court reviewing the case. The interpretation of jurisdiction agreements by national courts is a fundamental aspect in this research, since it is the national court that will examine the facts of the case and base its ruling upon them. Consequently, the legal principles applied by a specific court of law become relevant.

Chapter III presents the regulatory framework around this topic, in particular the international conventions and the European Union law. It discusses the possible conflict of norms between the European Union law and national laws, in addition to transport conventions. A special emphasis is on the priority order of different norms and in which situation the specialized conventions might take precedence over European Union law.

Chapter IV discusses two essential, yet complex questions regarding this topic. Firstly, the liability of non-contractual parties, such as actual carriers and subcarriers, as well as the carrier's assistants, in case there is damage to the goods and whether these third parties can rely on a jurisdiction clause in the carriage contract. Secondly, the legal position of the bill of lading holder, the consignee, who becomes a party to the carriage contract without participating in the negotiations of the terms of the contract. Accordingly, is the third party beneficiary bound by a jurisdiction clause that he has not agreed to, nor have been aware of its existence? The nature of carriage of goods contract as a contract in favour of a third party beneficiary is what makes this topic particularly intriguing. Consequently, the approach of different legal systems as well as European Union law regarding the rights and obligations of a third party in relation to a jurisdiction clause is at the heart of this research paper.

In conclusion, the thesis presents an overview of the relevant findings and arguments, and based upon them establishes that international sea transport would function more efficiently in case the parties to the carriage contract would incorporate jurisdiction clauses into their carriage contracts. Even though, the mandatory nature of different regulatory norms limit party autonomy, there is still enough room to select the most suitable forum for all the parties in the contract and by doing so, to clarify the complexity of available forums. Although, some mandatory provisions are needed to protect the weaker party, in commercial transactions where the parties possess equal bargaining power, limiting the parties' freedom of contract is merely an obstruction to the efficient functioning of sea transport.

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Maritime law, Maritime conventions, jurisdiction clauses, jurisdiction agreements, EU law, Brussels I, bill of lading, carriage of goods, carriage contract, sea transport

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Tiivistelmä - Referat – Abstract

Oikeuspaikka-asiat ovat olennainen osa kansainvälisiä sopimuksia, erityisesti sopimuksissa tavarankuljettamisesta meritse. Mikä on toimivaltainen tuomioistuin asian käsittelemään, kun rahti on vahingoittunut matkalla, ei aina ole selkeä. On useita normeja, sekä kansainvälisiä että kansallisia, jotka vaikuttavat oikean foorumin valintaan. Välttääkseen epäselvyyden oikean oikeuspaikan valinnassa sekä rinnakkaiset menettelyt, kuljetussopimuksen osapuolet, rahdin omistaja ja rahdinkuljettaja, voivat sisällyttää kuljetussopimukseensa oikeuspaikkalausekkeita osoittamaan mahdollisen riidan käsiteltäväksi nimettyyn tuomioistuimeen. On kuitenkin useita säännöksiä, kuten merioikeusyleissopimukset, kansalliset lait sekä erityisesti Euroopan Unionin oikeus, jotka rajoittavat tarjolla olevan oikeustoimipaikan valintaa merikuljetusriidoissa. Jotkut näistä normeista sisältävät pakollisia säännöksiä, joista edes sopimuksen osapuolet eivät voi poiketa. Tämä on selkeä rajoitus osapuolten autonomialle sekä tärkeä asia ottaa huomioon neuvotellessaan tavarankuljetussopimusta meriteitse.

I kappaleessa tutkielma kuvailee tutkimuksen taustaa sekä kuljetussopimuksiin lisättävien oikeuspaikkalausekkeiden etuja. Osapuolet ovat parhaimmassa asemassa arvioidakseen, mikä tuomioistuin olisi sopivin tapauksen ratkaisemaan. Tämä suunnittelu parantaa ennakoitavuutta sopimussuhteissa sekä välttää mahdollisesti kalliin ja pitkän oikeudenkäynnin koskien oikeaa toimivaltaa.

Kappale II osoittaa yleiskatsauksen, miten eri oikeusjärjestelmät, roomalainen oikeus ja common law, tulkitsevat oikeuspaikkalausekkeita sekä käsittelee kahden valtion, Suomen ja Yhdistyneen kuningaskunnan, lakeja. Lisäksi, käsitellään *Lis pendens* ja *forum non conveniens* oikeusperiaatteita oikeuspaikkalausekkeiden yhteydessä sekä kuinka niiden soveltaminen toimivaltariidoissa eroaa sen perusteella, mikä tuomioistuin asian käsittelee. Kansallisten tuomioistuimien oikeuspaikkalausekkeiden tulkinta on perustavanlaatuinen näkökohta tässä tutkimuksessa, koska kansallinen tuomioistuin on se, joka tutkii tapauksen tosiseikat ja muodostaa päätöksensä niiden perusteella. Näin ollen nimenomaisen tuomioistuimen soveltamat oikeusperiaatteet muodostuvat olennaisiksi.

Kappale III esittelee tätä aihetta ympäröivän sääntelykehyksen, erityisesti kansainväliset yleissopimukset sekä Euroopan Unionin oikeuden. Se käsittelee mahdollista oikeusnormiristiriitaa Euroopan Unionin oikeuden ja kansallisten lakien sekä kuljetusyleissopimusten välillä. Erityispaino on eri normien etusijajärjestyksellä sekä tilanteilla, joissa erikoistuneet yleissopimukset voivat mennä Euroopan Unionin oikeuden edelle.

Kappale IV käsittelee kahta olennaista, mutta monimutkaista kysymystä koskien tätä aihetta. Ensiksi, sopimuksenulkoisten osapuolien, kuten laivaajan ja alirahdinkuljettajan sekä kuljettajan avustajien vastuuta, kun tavara on vahingoittunut, sekä voivatko nämä kolmannet osapuolet vedota kuljetussopimuksessa olevaan oikeuspaikkalausekkeeseen. Toiseksi, konossementin haltijan, vastaanottajan, joka tulee sopimuksen osapuoleksi ilman, että on osallistunut sopimuksen ehtojen neuvotteluun, juridista asemaa. Näin ollen, onko kolmasosapuoliedunsaaja sidottu oikeuspaikkalausekkeeseen, johon hän ei ole suostunut eikä ole ollut tietoinen sen olemassaolosta? Kuljetusoikeuden luonne sopimuksena kolmannen osapuolen eduksi on se, mikä tekee tästä aiheesta erityisen kiehtovan. Näin ollen eri oikeusjärjestelmien ja Euroopan Unionin oikeuden näkökulma kolmannen osapuolen oikeuksista ja velvollisuuksista liittyen oikeuspaikkalausekkeisiin on tämän tutkimuspaperin ytimessä.

Yhteenvetona tutkielma muodostaa yleiskuvan olennaisista löydöksistä ja argumenteista sekä niihin perustuen osoittaa, että kansainvälinen merikuljetus toimisi tehokkaammin, jos kuljetussopimuksen osapuolet sisällyttäisivät oikeuspaikkalausekkeita kuljetussopimuksiinsa. Vaikkakin erilaisten pakollisten säännösten luonne rajoittaa osapuolien autonomiaa, on yhä tilaa valita kaikille sopimuksen osapuolille sopivin oikeuspaikka, ja näin tekemällä selkeyttää valittavana olevien foorumeiden monimutkaisuutta. Tosin joitakin pakollisia säännöksiä tarvitaan suojelemaan heikompaa osapuolta, mutta kaupallisissa transaktioissa, joissa osapuolet ovat yhtä vahvoja, osapuolien sopimusvapauden rajoittaminen on vain este tehokkaalle merikuljetukselle.

Avainsanat – Nyckelord – Keywords

merioikeus, merioikeusyleissopimukset, oikeuspaikkalausekkeet, oikeuspaikkasopimukset, Euroopan Unionin oikeus, Bryssel I asetus, konossementti, tavarankuljetus, kuljetussopimus, merikuljetus

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Muita tietoja – Övriga uppgifter – Additional information

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List of Abbreviations

Brussels Convention	Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters
Brussels I	Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, '*the Brussels I Regulation'*
Brussels I Recast	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *'The Brussels Recast Regulation'*
Carriage of Goods by Sea Act	COGSA
CISG	United Nations Convention on Contracts for the International Sale of Goods
CMR	United Nations Convention on Contract for the International Carriage of Goods by Road
EU	European Union
ECJ	Court of Justice of the European Union
FMC	Finnish Maritime Code
Hague Convention	Convention of 30 June 2005 on Choice of Court Agreements
Hague Rules	the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading
Hague-Visby Rules	the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading as amended by the 1968 Protocol and/or the SDR Protocol of 1979
Hamburg Rules	the United Nations Convention on the Carriage of Goods by Sea
Lugano Convention	the Lugano Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters
RCC	PTY Limited

Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
Rome Convention	the Convention on the law applicable to contractual obligations
Rotterdam Rules	the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom

1 Introduction

International sea transport is an important area of transportation, since around 90 percent of the world's trade is carried by sea. Accordingly, the shipping industry has a significant spot in the economy of the world.[1] The legal framework regulating international carriage of goods by sea is quite complex, combined from several elements connected with different jurisdictions and legal systems, in addition to international conventions and European Union (hereinafter EU) law. Jurisdiction provisions are particularly important in maritime law since sea transport generally involves several jurisdictions[2]. Choice of jurisdiction is one of the three major areas of conflict of laws, while the other two areas being choice of law and recognition of foreign judgments.[3]

A contract for the international carriage of goods contains a cross-border element, the transport is to commence in one country and end in another. In addition, the parties to the carriage contract, the cargo owner and the carrier, may be domiciled in different states. Therefore, once the cargo is damaged during transit, the question of which court to resort to becomes relevant. The cargo owner may bring actions in his state of domicile, while the carrier resorts to the court in his state of residence. Therefore, when there is a dispute between the cargo owner and the carrier, it is not always evident, which court has jurisdiction to review the case, or even which norms are applicable. Consequently, the case may turn into a lengthy dispute over the correct forum before the actual dispute even is reviewed. Additionally, there may be a situation where technically two courts have jurisdiction, in which case one of the courts must stay proceedings in order for the other one to declare itself competent or incompetent.

The selection of the correct forum is influenced by several regulatory norms, depending on the states in question. In international sea transport, the Maritime Conventions; the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading[4] (hereinafter the Hague Rules), the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading as amended by the 1968 Protocol and/or the SDR Protocol of 1979[5] (hereinafter the Hague-Visby Rules)

[1] International Chamber of Shipping, Shipping and World Trade <http://www.ics-shipping.org/shipping-facts/shipping-and-world-trade> accessed 24.2.2019

[2] Jurisdiction refers to the authority of a court to hear a case, and to make judicial decisions or to enforce laws.

[3] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 183

[4] the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels 1924)

[5] the 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading as amended by the 1968 Protocol and/or the SDR Protocol of 1979 (Brussels 1979)

and the United Nations Convention on the Carriage of Goods by Sea[6] (hereinafter the Hamburg Rules), as well as the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea[7] (hereinafter the Rotterdam Rules), although the Rotterdam Rules has not yet entered into force, must be examined, in addition to possible national rules. Importantly, in case of EU Member States, the applicable EU law needs to be applied. The most important regulatory instrument of the EU in jurisdiction matters is the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[8] (hereinafter Brussels I) and its successor the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[9] (hereinafter Brussels I Recast).

Since all EU Member States are bound by the rules of the Brussels I, it creates a limitation for the Member States to legislate in conflict with the Regulation, since generally EU law supersedes national and international law. As will be discussed in this paper, this may become troublesome in relation to national mandatory provisions, such as with the Nordic Maritime Codes. However, the Brussels I Recast does not affect the application of international conventions governing jurisdiction that Member States have concluded prior to the date of entry into force of the Regulation.[10] Consequently, international conventions regulating maritime transport that the parties may have entered into before 1 March 2002, take priority over the provisions of the Brussels I in respect to jurisdiction matters. This may in some instances create a conflict between the different legal instruments, in addition to limiting party autonomy in selecting the proper forum.

Notwithstanding, the hierarchical order of these different norms is not always clear. Since the primary legal basis for transportation law is based on international law, the Maritime Conventions, the interpretation of maritime law regulations may result to different conclusions than when dealing with areas regulated purely by domestic laws.[11] This conflict of different jurisdiction provisions has been a

[6] the United Nations Convention on the Carriage of Goods by Sea (Hamburg 1978)
[7] the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (Vienna 2009)
[8] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters
[9] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
[10] Brussels I Recast Article 73(3)
[11] Lena Sisula-Tulokas, *'Kuljetusoikeuden perusteet'*, (3rd edn, Talentum 2007) 3

strong influencer in selecting this research topic, since there are evident difficulties in establishing the correct jurisdiction in case of dispute, as well as, in determining the applicable legal basis in each case.

Jurisdiction clauses[12] are agreements made by the parties to the contract to determine, which court will have jurisdiction to review a contractual dispute between the parties. For example, the cargo owner and carrier may agree that in case of dispute over damaged cargo, the claimant will commence proceedings in a specific court of law. Consequently, when the parties know in advance, where the case will be heard, it allows them to plan ahead, and to make sure that the terms of the contract will be considered valid by the court reviewing the case.[13]

Jurisdiction agreements have several advantages, since they allow the parties to select a suitable forum in which to resolve their dispute. The parties are generally in the best position to evaluate, which court would be the fittest to solve the case in the interest of all the parties. This planning enhances orderliness and foreseeability in contractual relationships, while avoiding a possibly costly and lengthy litigation over proper jurisdiction and venue. Incorporating a forum selection clause into the contract also reduces parallel lawsuits with the parties in different forums.[14] For example, the cargo owner may commence proceedings against the carrier due to damage to the cargo occurred during transport in his state of domicile, while the carrier simultaneously brings actions against the cargo owner for damages caused to the vessel by the cargo in his place of residence. Moreover, a jurisdiction agreement should limit forum shopping in disputes within the scope of international transport, since normally the parties pursue to engage in litigation in a court most favorable for their needs.[15]

Often in carriage of goods contracts, the parties use standard terms, thus, they do not put that much time and effort into negotiating separate terms for the transportation. However, when the carriage is long and passes through several jurisdictions, possibly containing different modes of transport and several different carriers, it becomes essential to focus on the specific terms of the carriage agreement, including where to resort to in case of dispute and whether the selected jurisdiction clause is enforceable under the laws of the chosen forum. In negotiations of international transactions, there are many different elements to discuss that sometimes deciding on the proper venue in case of dispute may seem to be one of the less

[12] Jurisdiction clauses are also referred to as forum clauses, forum selection clauses, choice of forum clauses, choice of court agreements and jurisdiction agreements. For the purposes of this thesis, these terms are used interchangeably

[13] Trevor C. Hartley,*'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 163

[14] Michael E. Solimine, 'Forum-Selection Clauses and the Privatization of Procedure', (1992) 25(1) *Cornell International Law Journal* p. 51-52

[15] Andrew Bell, *'Forum Shopping and Venue in Transnational Litigation'* (OUP 2003) 276

relevant ones. However, in case one of the parties pursues to engage in international litigation, the procedure may result to be different and much more complicated than expected. Resorting to the judicial procedures of a foreign state may turn out to be expensive, not to mention foreign to the party in question. Consequently, the person or court interpreting an international agreement may result to be more significant than what is the applicable law of the contract in question.[16] Suing in a foreign court in a foreign language, where the norms and procedural rules may differ quite dramatically from the ones of the plaintiff, may turn out to be a real deciding point in whether to take the case to court. Notwithstanding, the jurisdiction rules of different states and international conventions may limit the availability of possible forums or consider a certain type of clause unenforceable. Not to mention the provisions of EU law that contain specific rules on the validity of a jurisdiction clause and whether the parties are bound by the terms of the clause.

Based on party autonomy, carriage contracts are primarily drafted freely. However, the content and application varies depending on the mode of transport and the relevant regulations. There are several regulations, both national and international, that limit the possible jurisdictions and the validity of choice of court agreements, which make this research complex and is the key element surrounding this thesis. Consequently, these different rules and regulations, and the possible conflicts between them, shall be discussed in this research paper.

This thesis topic is based on a breach of contract. One of the parties to the carriage contract has failed to perform his duties in accordance with the transportation contract, and accordingly, the other party claims for damages. However, in international carriage of goods, there are specific international rules that describe the responsibilities of the parties and the possible measures available when one of the parties fails to fulfill his obligations under the carriage contract. Accordingly, in order to understand the significance of forum clauses in international transportation, the different international regimes and transport law specific liability issues regulating carriage of goods overall need to be reviewed.

The special nature of a carriage of goods contract, as a contract that affects the rights of third parties that are not parties to the original carriage contract, is the element that makes this research particularly intriguing. The claimant may be a third party beneficiary in the carriage contract, the holder of the bill

[16] Sokol Colloquium, '*International Dispute Resolution: The Regulation of Forum Selection'* (Jack L. Goldsmith (ed), Transnational Publications Inc, 1997) 5

of lading[17], who is not a party to the carriage contract and yet becomes bound by the terms of the agreement. Consequently, the validity of a jurisdiction clause in relation to third parties is at the cornerstone of this research.

Furthermore, in addition to having a claim based on breach of contract, the claimant in a maritime dispute may have a claim based on tort against a third party, who is not a party to the original carriage contract, such being a subcarrier or an assistant of the carrier. Whether the jurisdiction clause in the carriage contract becomes applicable in relation to third parties is intricate, and varies between different jurisdictions. Consequently, this thesis shall discuss the different jurisdiction rules that apply in international sea transport and how they relate to jurisdiction clauses in carriage of goods by sea contracts, with the focus being on assessing the validity and relevance of jurisdiction clauses in such contracts.

1.1 Research questions, scope and structure of the thesis

The goal of this thesis is to examine whether the complexity of the international jurisdiction provisions and unpredictability of transport law related disputes would be better solved with the incorporation of a jurisdiction clause into the contract of international carriage of goods, or whether the harmonization of transport law through mandatory provisions is more efficient. Consequently, the different factors concerning the enforcement of jurisdiction agreements are presented. However, in order to justify the incorporation of these clauses it is essential to understand how the international regimes regulate forum issues overall, and which would be the proper channels to solve maritime disputes accordingly. Furthermore, a particular attention is paid to the position of third parties, such as actual and subcarriers as well as third party bill of lading holders, in respect to jurisdiction clauses, and whether third parties can rely on or be bound by contractual terms, which they have not agreed to.

To sum up, the research questions of this thesis are: Should jurisdiction clauses be incorporated to carriage of goods by sea contracts; Can non-contractual carriers rely on a jurisdiction clause in the carriage contract; and is a third party bill of lading holder, generally the consignee, bound by the terms of a jurisdiction agreement that he has not agreed to nor has been aware of?

[17] A bill of lading is a negotiable transport document that acts 1) as a receipt of the goods taken aboard the vessel; 2) evidence of the carriage contract; 3) document of title See. e.g. Binnaz Topaloglu,, *'The Validity of Jurisdiction and Arbitration Clauses as Against Third Party Holders of Bills of Lading – a Comparative Study Under French, English and EU law'* (Dissertation prepared and presented within the context of International Commercial Law Lecture, King's College London), 453

Because this topic involves nearly every international transportation contract negotiated, and is vital for the smooth functioning of sea transport, it provides a compelling topic for a research paper. However, since this topic is quite wide, and could expand to a more extensive academic research, the author has had to limit some of the discussed issues in order to be able to focus on the main problems related to this topic. Due to the limitation of pages, this research focuses mainly on choice of court agreements, with the exclusion of arbitration agreements. However, certain relevant case law related to arbitration disputes, is presented in order to provide a better understanding of the contractual issues versus mandatory provisions within the field of international transport. Additionally, this paper shall not focus on the provisions on choice of laws, although, the paper does address them occasionally, since often the issue of choosing the governing law is connected with choosing the correct forum. The scope of this research is based on the validity of jurisdiction clauses in international transportation contracts, therefore, the enforcement of foreign court judgments is out of its scope of application and further focus shall not be placed on the rules and/or methods on having a foreign court decision enforced in another jurisdiction. Moreover, this paper assesses the position of the parties engaged in commercial transactions, with the presumption that the parties are commercial entities engaged in business-to-business transactions. Accordingly, consumer contracts are out of its scope of application and will not be discussed.

The structure of this thesis is divided into five main chapters. Chapter 1 ("Introduction") shall present an overview of the topic itself and provide the surroundings for the following discussion. In addition, it describes the research questions and the methodology used in this research. Chapter 2 ("How do common law and civil law legal systems interpret jurisdiction clauses?") shall explain how different legal systems, civil law and common law, approach jurisdiction agreements. In order to get a better understanding, the author has selected one country from both legal systems as examples, which are Finland and the United Kingdom (hereinafter the UK). The national laws and judicial practice of these states regarding jurisdiction agreements will be analyzed more thoroughly. Chapter 3 ("Is there a conflict between EU law and the Transport Conventions?") shall present how the EU and International Maritime Conventions regulate jurisdiction clauses and their application in carriage of goods by sea and how these international rules affect the autonomy of the parties to select the most suitable forum for their needs. Additionally, the possible regulatory conflicts between different norms is analyzed. Chapter 4 ("Are third parties bound by jurisdiction clauses in contracts for the carriage of goods by sea?") shall discuss two essential problems connected with jurisdiction clauses in carriage of goods contracts. Firstly, the liability of third parties in carriage of goods contracts, such as actual carriers and subcarriers, in contrast with the contractual carrier. The question being, which ones are bound by the jurisdiction clause in the carriage

contract? Secondly, the paper shall focus on the position of a third party holder of a bill of lading, and how the rights and obligations of such third parties are influenced by a jurisdiction clause in the bill of lading. Chapter 5 ("Conclusion") shall present an overview of the analysis and the relevant findings.

1.2 Methodology and the sources used

The methodology used in this research is based on legal dogmatics. The thesis presents the legal norms and statutes in force and pursues to systematize them in relation to choice of court agreements in international transportation. This method is needed in order to evaluate the legal status and validity of such agreements within the international regimes, as well as, nationally.

Furthermore, the paper provides a comparison on how different legal systems have adopted jurisdiction clauses in carriage of goods contracts and discusses the differences between legal doctrines applied to the interpretation of the enforceability of jurisdiction agreements. Additionally, the national laws regulating this topic and the approach of the EU are analyzed with a comparative approach. This is an essential part of the research in order to present a sufficient analysis of the validity of forum clauses. Since the goal of this research paper is to examine whether international transport would function more efficiently if jurisdiction clauses were incorporated into carriage of goods contracts, a discussion of different approaches in this regard is presented in order to establish the facts.

The legal sources used in this research contain primary sources, in particular international conventions and national laws, with a strong emphasis on EU law. A particular focus will be on the key Maritime Conventions, the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, in addition to the Brussels I Recast. In addition, the relevant case law shall be discussed to provide practical background for the analysis with a particular interest in the decisions of the Court of Justice of the European Union[18] (hereinafter ECJ). Furthermore, the essential literature, in addition to legal articles, have been used to support the following argumentation.

[18] Before the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007) entered into force on 1 December 2009, the Court of Justice of the European Union was referred to as the European Court of Justice. For the purposes of this research paper, these names shall be used interchangeably with the abbreviation ECJ

2 How do common law and civil law legal systems interpret jurisdiction clauses?

This chapter discusses the differences between common law and civil law in relation to jurisdiction clauses. To give a better understanding of how these legal systems affect the incorporation of jurisdiction clauses in international transport, the paper shall compare the approach of two different states to the validity and inclusion of choice of court agreements in international carriage of goods contracts. The examples chosen are the UK as a representative of common law, and Finland representing the approach of the Nordic countries in the civil law system. The following analysis will discuss the key doctrines used in the interpretation of jurisdiction clauses in carriage of goods contracts and the requirements that need to be fulfilled in order for these clauses to be recognized and enforced in foreign courts.

However, in order to establish patterns of recognition for forum clauses, the special features regulating jurisdiction issues in general need to be reviewed in order to see how different doctrines and judicial practice have influenced the development of including jurisdiction clauses in carriage contracts. Notwithstanding, before focusing on the differences between common law and civil law principles, an overview of evaluating the legitimacy of jurisdiction clauses is presented.

2.1 The general criteria for a valid jurisdiction agreement

There is no absolute general rule to determine will a court give effect to a jurisdiction clause, notwithstanding, there are certain general criteria in respect to the validity of the clause. All jurisdictions apply roughly the same criteria. The jurisdiction clause must be clear and precise in order for it to be enforced. It is vital for the parties to know and understand the terms of their contract, and thus, the jurisdiction clause must be written in a form that all the parties can follow its terms. However, the level of preciseness may vary between different countries.[19] In addition, a reference to a jurisdiction clause contained in another document should be detailed and precise. In some instances, a forum clause in a charterparty have been held invalid against a holder of a bill of lading when the text of the charterparty was not exact enough and it was not attached to the bill of lading. Moreover, the jurisdiction clause needs to be readable. The person against whom the clause is invoked needs to know about the existence and content of the clause[20]. Furthermore, courts in general will not enforce jurisdiction clauses that are

[19] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 249-250

[20] In *Allianz v India Steamship Co*, the Supreme Court of the Federal German Republic held a jurisdiction clause to be invalid, due to the size of the print of the clause being too small

fundamentally unfair, therefore, if the clause is based on fraud, is unjust or unreasonable, or if it violates the public policy of the forum state, the court will normally find the clause to be invalid.[21]

The parties to the contract may choose whether they prefer their jurisdiction clause to be exclusive or non-exclusive.[22] However, the validity of the clause may vary depending on the form of the clause, since different national courts may interpret the wording of the clause differently. An exclusive jurisdiction clause requires that disputes governed by the agreement are to be resolved exclusively in a specified forum. As compared to a non-exclusive jurisdiction clause that allows parties to bring their claims in the jurisdiction defined in the contract, however, it does not deny access to other judiciaries.[23]

Courts in common law countries will usually consider jurisdiction clauses to be non-exclusive, unless the wording of the text expressly defines otherwise.[24] This approach is based on the idea, that the parties should not be deprived of access to judicial remedies, and thus, they should not contractually waive such rights. UK courts generally prefer non-exclusive clauses, however, exclusive clauses are not considered invalid. A jurisdiction agreement in England will primarily be interpreted according to the will of the parties. In order for the forum clause to be considered exclusive, there must be some evidence of an exclusion of all other jurisdictions. In addition, UK courts are bound by the rules of EU law on jurisdiction matters, which must be taken into consideration when interpreting the exclusivity and validity of the jurisdiction agreement. In general, civil law legal systems regard jurisdiction clauses to be exclusive. The basic notion is that if the parties to the contract have submit to the jurisdiction of a specific state, then accordingly, this ought to be the only suitable forum for the dispute.[25]

Jurisdiction clauses in EU Member States are to be drafted in accordance with EU law.[26] In contrast to the common law approach, EU regulations interpret jurisdiction agreements presumably exclusive, unless the parties have expressly agreed otherwise.[27] Additionally, jurisdiction agreements, which are

[21] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 250-252

[22] James Fawcett and Janeen M. Carruthers, *Private International Law* (14th edn. OUP 2008) 289

[23] Trevor C. Hartley, *'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 163

[24] US courts in particular are reluctant to consider a jurisdiction agreement exclusive

[25] Gary Born, *'International Arbitration and Forum Selection Agreements: Drafting and Enforcing'*, (5th edn, Kluwer Law International 2016) pp. 13-28

[26] Under Brussels I Recast Article 25.5, a court of a Member State, which is indicated by the jurisdiction clause, has exclusive jurisdiction over disputes covered by the agreement

[27] James Fawcett and Janeen M. Carruthers, *Private International Law* (14th edn. OUP 2008) 289

binding on only one of the parties, 'asymmetrical clauses' are allowed under EU law. In practice, such a clause is exclusive for one of the parties and non-exclusive for the other party.[28]

2.2 The legal principles – *lis alibi pendens* and *forum non conveniens* – applied by courts in jurisdiction disputes

One of the most crucial differences between common law and civil law regarding choice of court is how these two legal systems respond to possible conflicts of forum when several courts have jurisdiction in a dispute.[29] Civil law countries do not react in these cases until there is an actual conflict, accordingly, when the same case is brought before two different courts. Based on the doctrine *lis alibi pendens*[30], a court has to dismiss a case if the same case is already pending before another court in a foreign judiciary. Therefore, the court that has received the case later must dismiss the claim in favor of the court that has initiated the proceedings first. This method is quite simple and objective. However, the disadvantage is that it disregards determining, which court is more appropriate to solve the dispute in question. Therefore, filing the claim first is more significant than bringing actions in the proper forum. This clearly presents an advantage to the plaintiffs who know how to litigate within the system and causes a concern for judicial efficiency.[31]

The common law system, although not rejecting the doctrine of *lis pendens*, prefers the doctrine of *forum non conveniens*, which pursues to balance different interests and factors to determine, which court is more appropriate and convenient to review the case. Although, this method focuses on finding a rationale solution, the disadvantage is that it is rather subjective based on the discretion of the judge. Therefore, the two courts may come to different conclusions, regardless of applying the same criteria.[32] The *forum non conveniens* allows the court where the plaintiff filed his motion to dismiss the claim in favor of the court preferred by the defendant, if the court considers the foreign judiciary to be more appropriate and convenient forum for the proceedings.[33] The doctrine also provides protection for the plaintiff, since

[28] Gary Born, *'International Arbitration and Forum Selection Agreements: Drafting and Enforcing'*, (5th edn, Kluwer Law International 2016) pp. 13-28

[29] The legal sources of these two legal systems vary; traditionally, common law reviews court decisions as the most important legal source, while civil law countries prefer statutory laws. See e.g. Ulla Liukkunen, *'Cross-Border Services and Choice of Law – A Comparative Study of the European Approach'* (Peter Lang GmbH 2006) 89

[30] *Lis alibi pendens* is sometimes called *lis pendens*, however, in this thesis the terms are used interchangeably

[31] Trevor C. Hartley,*'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 205

[32] Stephen C. McCaffrey and Thomas O. Main, *'Transnational Litigation in Comparative Perspective: Theory and Application'* (OUP 2010) 131

[33] Christopher A. Whytock & Cassandra Burke Robertson, 'Forum non Conveniens and the Enforcement of Foreign Judgments', (2011) 111(7) *Columbia Law Review* 1444, 1453

usually the defendant will prefer to have the proceedings take place at his place of domicile, which might create a disproportionate burden for the plaintiff to have his rights protected in a foreign court of law.[34]

The fundamental basis for applying *forum non conveniens,* is that it is for the defendant to demonstrate that another court is more convenient to resolve the dispute, since it has a stronger connection to the case than the court seized. Essential factors to establish such a connection are the governing law, the residence of the parties, the availability of witnesses and relevant evidence. However, the court will have to consider how far the proceedings in the other court have progressed and whether that court is capable of adjudicating all the elements of the international dispute.[35] The *forum non conveniens* doctrine focuses on finding the proper venue for the parties of the dispute, thus, it emphasizes the interests of the parties over public interests. This represents a conflict of interests between the two legal systems, the civil law being focused on avoiding a struggle between two courts, as for the common law finding the most suitable venue to hear the case.[36]

2.2.1 The influence of *lis pendens* in Finland

Historically, Finland has been rather reluctant in relation to recognition and enforcement of foreign judgments. Therefore, it is understandable that the *lis pendens* influence has been minimal, consequently there has been little case law on this issue.[37] However, with the entering of supranational legislation and the harmonization of EU law, Finland has adopted the legal principles established by EU law, in the Brussels I and Brussels I Recast, including the provisions on *lis pendens*, which are later discussed in this paper.[38]

2.2.2 The development of *forum non conveniens* in England through legal practice

The background of *forum non conveniens* goes back to the 19th century Scotland. The idea behind the doctrine was that the Scottish court could balance the interests of the parties, and to exercise justice by choosing a more appropriate court than the Scottish one to adjudicate the case. However, originally the

[34] Edward L. Barrett Jr., 'The Doctrine of Forum Non Conveniens' (1947) 35(3) *California Law Review* 380, 380
[35] Andrew Bell, *'Forum Shopping and Venue in Transnational Litigation'* (OUP 2003) 152
[36] Trevor C. Hartley,*'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 206
[37] Hannu Tapani Klami 'Finland' in J.J. Fawcett (ed), *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law Athens, August 1994* (Clarendon Press 1995) 167
[38] As a legal principle, the *lis pendens* doctrine in national procedural law in Finland is regarded connected to the principle of *ne bis in idem,* accordingly the same case may not be judged twice

English courts were reluctant to apply the doctrine.[39] In England, the application of *forum non conveniens* was limited until *the Atlantic Star*[40] case, which started a shift towards relieving the defendant's burden under a *forum non conveniens* analysis under English law. In *Atlantic Star*, Dutch barge owners brought actions in England against Dutch ship owners due to damages caused by a collision of the vessel with a barge. The defendant argued that the only connection the case had with England was that the ship had occasionally stopped at English ports. The House of Lords found that due to the circumstances of the case, adequate connection to England was missing in order to have the case trialed in England.[41]

In *MacShannon v Rockware Glass Ltd*[42], the Scottish plaintiffs brought actions against the English defendants in England, because they expected the English Court to grant higher damages and to conduct a speedier procedure. The English Court established that although the plaintiffs' choice of forum holds significance, it is not enough to support their claim to be judged in England. Moreover, the court placed the burden of proof to the plaintiff, instead of the defendant, to demonstrate that a stay would be unjust for the plaintiff.[43]

Although, these cases took a step towards the idea behind the doctrine of *forum non conveniens*, even after *the Atlantic Star* and *MacShannon v Rockware Glass Ltd*, English courts still refused to officially include the *forum non conveniens* doctrine as part of English law.[44] *The Abidin Daver*[45] case, however, changed the legal status of *forum non conveniens* within English law. The case concerned a collision between a Turkish ship and a Cuban ship, in the territorial waters of Turkey. The collision caused damage to both vessels. The Turkish shipowners arrested the Cuban ship and brought proceedings in the Turkish court against the Cubans. Three months later, the Cuban parties arrested a sister ship of the Turkish vessel in England. The Turkish parties filed a motion to stay proceedings in England. The trial judge granted the stay, but the Court of Appeal reversed the verdict. The Court of Appeal found that it was not justified to deny the plaintiffs from proceeding their case in England merely due to balance of inconvenience. However, the House of Lords evaluated the factors connecting the proceedings to England and found

[39] Xhelilaj Ermal & Lapa Kristofor, 'The Development of Forum non conveniens and Lis alibi pendens' Doctrines in the International Maritime Law', (2012) 13(18) *Analele Universitatii Maritime Constanta* 77, 77
[40] *The Atlantic Star* [1974] AC 436
[41] Stephen C. McCaffrey and Thomas O. Main, *'Transnational Litigation in Comparative Perspective: Theory and Application'* (OUP 2010) 135-136
[42] *MacShannon v Rockware Glass Ltd* [1978] AC 795, 820
[43] Stephen C. McCaffrey and Thomas O. Main, *'Transnational Litigation in Comparative Perspective: Theory and Application'* (OUP 2010) 136
[44] Xhelilaj Ermal & Lapa Kristofor, 'The Development of Forum non conveniens and Lis alibi pendens' Doctrines in the International Maritime Law', (2012) 13(18) *Analele Universitatii Maritime Constanta* 77, 78
[45] *The Abidin Daver* [1984] 1 All ER 470

that neither of the parties had any actual connections to England. All the elements related to the case referred to Turkey, therefore, Turkey was clearly the natural forum for the proceedings. The Court did not find any evidence that the plaintiffs would be under disadvantage in Turkey as compared to having the case trialed in England.

After *the Abidin Daver* case, the *forum non conveniens* was considered part of English law.[46] However, it was in *the Spiliada*[47], in which the House of Lords established the basis of the doctrine in its current form. The case regarded shipowners that were a Liberian corporation having part of their management located in Greece and the other part in England. Canadian exporters of sulphur chartered their ship *Spiliada* to transport a cargo of sulphur from Vancouver to India. During the carriage, the ship was damaged due to the carried cargo, therefore, the shipowners brought actions against the shippers in Vancouver due to a breach of contract governed by English law. The defendants objected claiming that it was not the proper venue for the proceedings. The trial judge dismissed the application, because he was in the process of judging a case regarding a similar action involving the same defendants and another ship, *the Cambridgeshire*, so therefore, it would be cost efficient to have the *Spiliada* case heard in the same court of law. However, the Court of Appeal overruled the decision and stated that it was impossible to determine based on the presented facts that the English court was more suitable and just for the hearing.[48]

Afterwards, the House of Lords defined the general principles for a stay based on *forum non conveniens*. Consequently, the court must be satisfied that there is another available forum with competent jurisdiction to serve as the appropriate judiciary, where the case can be tried more suitably for the interests of all the parties and the ends of justice.[49] The burden of proof lies with the defendant to show that the other forum is more appropriate than the English forum due to having a stronger connection to that jurisdiction, for example, it is the location of the witnesses or the parties' place of residence or business. However, if the court finds that the other forum is more appropriate for the proceedings, the plaintiff has to prove that based on the specific circumstances, due to justice, the proceedings should take place in England.[50] *The Spiliada* case clarified the requirements for the *forum non conveniens* doctrine to apply

[46] Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, (Taylor and Francis Group 2014) 165
[47] *Spiliada Maritime Corporation v Cansulex* [1987] 1 AC 460 (HL)
[48] Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, (Taylor and Francis Group 2014) 167-168
[49] *The Spiliada* [1987] 1 Lloyd's Rep 1 at p. 10 (HL), Available at William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 1960
[50] Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, (Taylor and Francis Group 2014) 168-169

in individual cases. Accordingly, it established its conformity with the original Scottish doctrine and created an exact guideline for judges to determine the applicability of the doctrine.[51]

Although, the cases above provided the legal basis for the *forum non conveniens*, it was the principles established by the Court in *the Eleftheria* and repeated in *the El Amria* that established the final application of the doctrine in jurisdiction agreements.[52] In *the Eleftheria*[53], the court discussed circumstances, which do not establish a strong cause for the courts to stay proceedings in favor of a foreign forum clause. In the referred case, Greek shipowners were contracted to carry wood on board the vessel, *the Eleftheria*, to London and Hull. When the ship arrived in London, it was only able to discharge part of the cargo due to labor trouble at the docks. The ship sailed to Rotterdam and discharged rest of the cargo there in accordance with the contract of carriage under the circumstances. The plaintiffs claimed the expenses caused by transferring the cargo back to its destination and relying on a breach of contract arrested the ship in England. The defendants filed for a stay of actions, since the jurisdiction clause in the bill of lading referred the proper forum to be in the country, where the carrier had his principal place of business, which was in Greece. The English Court found that since the parties had chosen together the jurisdiction and applicable law, there were no sufficient reasons to deny jurisdiction of the Greek courts. The Court held that the plaintiffs had not shown a strong cause why the jurisdiction agreement would not be binding upon the parties, and they would not be undermined by having to sue in Greece. Consequently, the court granted the stay, and confirmed that all the circumstances in each case need to be reviewed individually.[54]

The *El Amria*[55], which has been used by courts in following cases regarding jurisdiction agreements, presents '*a broad judicial discretion'* in determining the proper forum for the dispute. By considering whether a stay should be granted, it allows judges to consider which would be the appropriate forum by evaluating the ends of justice and the interests of the parties.[56] In *El Amria*, Lord Brandon following the decision of *the Eleftheria*, laid down criteria under which *forum non conveniens* should be assessed, when the plaintiff brings actions in England in breach of an exclusive jurisdiction agreement referring to a foreign forum. According to the established criteria, the Court has a discretion whether to grant a stay.

[51] Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, (Taylor and Francis Group 2014) 173
[52] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 225
[53] *The Eleftheria* [1969] 1 Lloyd´s rep 237, 246
[54] Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, (Taylor and Francis Group 2014) 183
[55] *The El Amria* [1981] 2 Lloyd´s Rep 119 (C.A.)
[56] Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, (Taylor and Francis Group 2014) 181

However, the discretion should be exercised by granting a stay unless there is strong cause for not doing so, in that case, the burden of proof is on the plaintiff. The Court should consider all the circumstances of the case, *inter alia*, where the evidence is available, whether the parties are more closely connected to another country, whether the interest of the defendant to have the case trialed in a foreign country is genuine and whether the plaintiffs would be prejudiced by having to sue in the foreign Court.[57]

The courts of England today may use these principles established by Lord Brandon to assess whether the circumstances of a particular case qualify to grant for a stay of proceedings. Notwithstanding, when parties to an international agreement stipulate the proper forum to be English courts, such clause will be considered a submission to English jurisdiction. Furthermore, once the proceedings have begun in England, the defendant will have difficulties in filing for a stay, due to the doctrines of *forum non conveniens* and *lis alibi pendens*.[58]

2.3 National legislation on forum clauses in contracts for the carriage of goods by sea

In an international carriage contract, the parties can choose the governing law of the contract to be, for instance, one of the Maritime Conventions by incorporating a paramount clause[59] into the agreement. However, a paramount clause may be considered invalid if it conflicts with the mandatory provisions of national laws.[60] Similarly, the parties may choose to incorporate a jurisdiction clause into their carriage contract, in which case the validity of the clause is assessed based on either the rules of the international conventions or national laws. Accordingly, it is necessary to review the national rules regulating international carriage of goods and their relevance towards jurisdiction agreements.

2.3.1 The application of jurisdiction clauses in Finland based on the Nordic Maritime Code

The Nordic countries[61] share a common legal tradition, which has contributed to these countries cooperating within legal work, from negotiating international conventions to preparatory work for

[57] *El Amria* [1981] 2 Lloyd´s Rep 119, 127, See e.g William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 226-228
[58] Andrew Bell, *'Forum Shopping and Venue in Transnational Litigation'* (OUP 2003) 280
[59] Conflict of law clause in a carriage of goods contract that refers to an international convention is called a paramount clause. See e.g. Lena Sisula-Tulokas, *'Kuljetusoikeuden perusteet'*, (3rd edn, Talentum 2007) 119
[60] Erling Selvig, 'The Paramount Clause' (1961) 10(3) *The American Journal of Comparative Law* 205, 212
[61] The Nordic countries engaged in legislative cooperation are Finland, Sweden, Norway and Denmark. Although, Iceland is part of the Nordic countries it is not part of the legislative cooperation, and therefore, for the purposes of this research the four countries mentioned are called 'the Nordic states'

national legislation.[62] Since the 1920s, the drafting of maritime laws between the Nordic states has taken place in cooperation. In 1994, the Nordic countries adopted a common Maritime Code[63].[64] All the Nordic countries have also ratified the Hague-Visby Rules[65]. In addition, the Nordic states have signed the Hamburg Rules, but none of them has ratified it. However, the Nordic Maritime Code contains similarities with the Hamburg Rules, especially in reference to jurisdiction matters. Finland, for instance, has partly implemented the provisions of the Hamburg Rules into its national laws.[66]

In carriage of goods between the Nordic states, the courts of these states are bound to follow the provisions of the Maritime Code in respect to forum clauses. Thus, the court is obligated to set aside a forum clause if it is in conflict with the provisions of the Code.[67] However, the national jurisdiction provisions do not apply if they are in conflict with the provisions of the Brussels I Recast or the Lugano Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters[68] (hereinafter Lugano Convention).[69]

In the event that the bill of lading does not contain any express provisions on the applicable law, the law of the contract is determined based on the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations[70] (hereinafter Rome I). Contracts entered into before 17 June 2008 are regulated by the Convention on the law applicable to contractual obligations[71] (hereinafter Rome Convention). However, since Finland had ratified the Hague-Visby Rules before the Rome I entered into force, the provisions of the Hague-Visby Rules take priority in sea transport matters, if the bill of lading is issued in a Contracting State, or the transport departs from

[62] Gorton Lars, 'Nordic Law in the Early 21st Century – Maritime Law' (2007) 50 *Scandinavian Studies in Law* 103, 104
[63] The Finnish and Swedish versions of the Maritime Code are identical while differing from the structure of the Norwegian and Danish versions of the Code, which are identical between themselves
[64] William Tetley, Q.C, 'The Demise of the Demise Clause', (1999) 44 *McGill Law Journal* 807, 845
[65] With the exception of Norway, all Nordic countries have also ratified the Hague Rules
[66] Thomas Kolster, 'Governing Law and Forum Clauses in Contracts of Carriage by Sea', ICMA XX: 25 September 2017 <http://icma2017copenhagen.org/Presentations/CS4_Kolster_1.pdf > accessed 23 January 2019
[67] GARD, *'Forum selection clauses in bills of lading'* (1996) Insight 143, (1), September 1996 <http://www.gard.no/web/updates/content/52392/forum-selection-clauses-in-bills-of-lading> accessed 20 October 2018
[68] The Lugano Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Lugano 2007)
[69] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 187-188
[70] The Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('*the Rome I Regulation'*)
[71] The Convention on the law applicable to contractual obligations (Rome 1980)

a Contracting State. In case the applicable law based on Rome I or the Rome Convention is Finnish law, the Finnish Maritime Code[72] (hereinafter FMC) will be applied as the law of the contract.[73]

Provisions regarding jurisdiction within carriage of goods by sea have been incorporated into the FMC[74] in accordance with the Hamburg Rules[75]. The aim of the provision is to protect the position of the bill of lading holder, cargo owner, when the carriage departs or disembarks in the Nordic states. This provision allows the plaintiff to file a claim in a more suitable court than the forum of the carrier, which may be located in a distant state.[76] The FMC establishes mandatory rules on jurisdiction in order to enhance the cargo owner's opportunities to file a claim in a court, which has a natural connection to the carriage contract.[77] According to the FMC, any stipulation in a contract of carriage or bill of lading, which limits the right of the plaintiff to institute a court procedure concerning the carriage of goods, will be null and void to the extent that it limits the right of the plaintiff to institute such an action, in a court within jurisdiction situated in one of the following place;

1) *"where the defendant has his principal place of business, or, in the absence thereof, where the defendant has his habitual residence,*
2) *where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made,* or
3) *where the agreed port of loading or the agreed or actual place of discharge is situated.*

Notwithstanding the provisions in paragraph 1, an action may be instituted in a court of the place, which has been named in the contract of carriage."[78]

In an action based on a contract of carriage, where the cargo is loaded or discharged in a port in Finland, or any other Nordic country, the plaintiff has the right to file a claim at the jurisdiction of that port

[72] The Finnish Maritime Code (674/1994)
[73] Ulla von Weissenberg and Linda Ojanen, 'Finland' in David Lucas (ed) *Shipping and International Trade Law: Jurisdictional Comparisons* (2nd edn, Thomson Reuters 2015) 177
[74] The rules on competent forum in carriage of goods by sea are contained in the FMC Chapter 21 Section 4
[75] The jurisdiction provisions are described in Article 21 of the Hamburg Rules
[76] Peter Wetterstein, 'Jurisdiction and Conflict of Laws under the New Rules on Carriage of Goods by Sea' in Hannu Honka (ed*) The New Carriage of Goods by Sea – The Nordic Approach including Comparisons with Some Other Jurisdictions* (Institute of Maritime and Commercial Law, (Åbo Akademi University 1997) 321
[77] Peter Wetterstein, 'Jurisdiction and Conflict of Laws under the New Rules on Carriage of Goods by Sea' in Hannu Honka (ed) *New Carriage of Goods by Sea – The Nordic Approach including Comparisons with some other Jurisdictions* (Institute of Maritime and Commercial Law, (Åbo Akademi University 1997) 330
[78] Finnish Maritime Code Chapter 13 Section 60

regardless of the forum clause included in the contract.[79] However, the parties may agree on the proper venue for the proceedings, after the dispute has arisen.[80]

Although, the mandatory provisions of the Nordic Maritime Code were designed to protect the weaker party, they also restrict the fundamental principle of freedom of contract. When transacting in one of the Nordic States, the parties should always bear in mind the specific provisions of the Maritime Code, since they may limit the validity of an otherwise legitimate jurisdiction agreement.[81] The mandatory provision forces the jurisdiction agreement to lose its validity and directs the parties to resort to the judiciary of the places defined in the FMC, accordingly, setting aside the will of the parties. However, if the parties have chosen an EU Member State to be their chosen forum, the EU regulations shall apply, in which case the validity of the jurisdiction clause will be assessed based on the provisions of the Brussels I Recast.[82]

The parties may include a jurisdiction clause to their carriage contract, as long as it refers to one of the places described in the FMC. Since, it is important for the carrier to include a jurisdiction clause to the carriage contract to ensure that proceedings will not be commenced just anywhere, in addition to the cargo owner having the right to bring actions in a state, which the carriage contract is most closely connected to, the limitations on the FMC can be seen to establish a compromise between the parties to ensure the rights of both parties.[83]

Notwithstanding, the provisions stated above, the parties still have the right to choose a different forum after the dispute has arisen.[84] In this way, party autonomy is still protected, assuming the parties still agree on the chosen forum after the dispute has emerged. However, since the plaintiff can always sue the carrier in the place of loading or discharge, one of them likely being the domicile of the cargo owner, the plaintiff will more likely rely on the provisional protection instead of agree on an alternative forum, which might be more beneficial for the carrier.

[79] GARD *'Forum selection clauses in bills of lading'*, (1996) Insight 143, (1), September 1996 <http://www.gard.no/web/updates/content/52392/forum-selection-clauses-in-bills-of-lading> accessed 5 November 2018
[80] Finnish Maritime Code Chapter 13 Section 60
[81] *Ibid.*
[82] Brussels I Recast Article 25
[83] Finnish Government Bill, HE 62/1994, p. 58
[84] Finnish Maritime Code Chapter 13 Section 60

In disputes, not covered by the FMC, or by foreign Maritime Codes, the rules and regulations governing jurisdictional competence in general shall apply.[85] In Finland, the applicable judiciary being the District Court with jurisdiction over the place where the defendant has his domicile or habitual residence[86], or when the defendant is a legal entity, the place where it is registered or where the administration of the legal entity is primarily conducted[87]. Notwithstanding, the provisions applicable to transport from/to the Nordic states, the regulations on jurisdiction in the Brussels I Recast, in addition to the Brussels and Lugano Conventions, must be given precedence.[88]

2.3.2 The UK legislation on jurisdiction issues

Traditionally, as a common law jurisdiction, the legal framework in the UK is based on case law and legislation. Especially maritime law has strongly been developed through relevant cases, however, some statutes do exist in the key areas regulating shipping matters. The UK has implemented into its national laws the international Maritime Conventions that it has joined.[89]

The Hague-Visby Rules is the most essential Maritime Convention that the UK is a party to, and it has been given force of law in the UK by the Carriage of Goods by Sea Act (hereinafter COGSA) 1971. The COGSA 1992 contains provisions on contracts of carriage, as well as bills of lading. There is no legislation on multimodal transport, however, it is generally accepted that the Hague-Visby Rules are applicable to the sea leg of such carriage of goods contracts. Since the UK has not ratified the Hamburg Rules, nor the Rotterdam Rules, these Conventions are not applicable to transport to/from the UK.[90]

The Hague Rules were incorporated into the COGSA 1924. However, in this Act, the freedom of contract was limited.[91] The contract of carriage of goods by sea ought to contain a clause referring to the applicable 'Rules' that were to be followed within the contract in question.[92] Although, this provision

[85] Peter Wetterstein, 'Jurisdiction and Conflict of Laws under the New Rules on Carriage of Goods by Sea' in Hannu Honka (ed) *New Carriage of Goods by Sea – The Nordic Approach including Comparisons with some other Jurisdictions* (Institute of Maritime and Commercial Law, (Åbo Akademi University 1997) 320
[86] The Finnish Code of Judicial Procedure (4/1734) Chapter 10 Section 1
[87] *Ibid*., Chapter 10 Section 2
[88] GARD *'Forum selection clauses in bills of lading'*, (1996) Insight 143, (1), September 1996 <http://www.gard.no/web/updates/content/52392/forum-selection-clauses-in-bills-of-lading> accessed 20 October 2018
[89] James Gosling, Rebecca Warder and Tessa Jones Huzarski 'Chapter 17 England & Wales' in James Gosling and Tessa Jones Huzarski (eds) *The Shipping Law Review*, (3rd edn, Law Business Research 2016) 167-168
[90] *Ibid*., 172
[91] R. Wolfson, 'The English and French Carriage of Goods by Sea Enactments' (1955) 4 (4) *International and Comparative Law Quarterly* 508, 509
[92] Carriage of Goods by Sea Act 1924 Section 3

was considered not to be obligatory and failure to comply with it did not declare the contract null and void, it did limit the parties' freedom of contract.[93]

The section limiting freedom of contract was abolished when the 1924 Act was replaced by the COGSA 1971, which incorporated the Hague-Visby Rules.[94] However, even before the 1924 Act was repealed, freedom of contract between the parties was discussed in the English courts. In *Pyrene v Scindia*[95], the court found that the owner of the cargo could sue the carrier based on a contract of carriage for damage occurred before loading the goods on board the vessel. The court based its ruling on determining that it was the intention of all three parties – seller, buyer and carrier – that the seller should participate in the contract of affreightment, as long as it concerned him.[96]

As an EU Member State, the UK is bound by the applicable EU regulations. However, the UK is estimated to leave the EU on 29 March 2019[97]. Consequently, there remains some uncertainty on how 'Brexit' will affect the existing regulations, and how the Withdrawal Agreement[98] will regulate jurisdiction issues if it will enter into force or whether the UK will exit the Union without any kind of transition period. For the time being, the Convention of 30 June 2005 on Choice of Court Agreements[99] (hereinafter Hague Convention) and the Lugano Convention seem to be the two means under which jurisdiction issues could be resolved between States parties to these Conventions. However, since the matter is still unresolved, this paper will not attempt to predict the possible changes in this regard nor pay further attention to the changes to be caused by the exit.

For the purposes of this thesis, the UK is still obligated to follow the applicable EU regulations. Notwithstanding, in the event that the UK will no longer comply with the rules of the Brussels I Recast, it will be even more vital for the parties engaged in carriage of goods to incorporate a jurisdiction clause into their carriage contract to avoid further confusion. In addition, the impact of 'Brexit' to the enforcement of foreign court rulings will have to be taken into consideration, since there is the possibility

[93] R. Wolfson, 'The English and French Carriage of Goods by Sea Enactments' (1955) 4 (4) *International and Comparative Law Quarterly* 508, 512
[94] David Lucas, Jeff Isaacs and David Pitlarge, 'England & Wales' in David Lucas (ed) *Shipping and International Trade Law: Jurisdictional Comparisons* (2nd edn, Thomson Reuters 2015) 149
[95] *Pyrene v Scindia* [1954] 1 Q.B. 402
[96] William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 2341
[97] The UK held a referendum on 23 June 2016, which resulted in the state deciding to exit the EU under Article 50 of the Lisbon Treaty
[98] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018
[99] Convention of 30 June 2005 on Choice of Court Agreements (the Hague 2005)

that once the transition period is over if such will exist, the UK courts will no longer automatically enforce foreign court rulings, as is the case between EU Member States. However, this issue is out of scope of this thesis, and will not be discussed in more detail.

2.3.2.1 The most essential case law reflecting the development of enforcing contractual clauses in England

Generally, English courts have confirmed forum clauses in commercial contracts. Since English courts are inclined to abide by the intention of the parties to the contract, they will rarely dismiss a jurisdiction clause submitting the dispute to a foreign court of law, precluding circumstances that are inequitable or unjust.[100] Although, it is a common belief, based on legal practice and tradition within common law, that it is the prerogative of the court to protect its jurisdiction, and to rule on the validity of a contractual clause.[101] Therefore, the court has discretion whether or not to give effect to the contractual clause.[102]

A case with a significant precedential value within the English judicial practice has been the *Vita Food Products Inc v Unus Shipping Co*[103], in which the English Privy Council went as far as to weigh the intention of the parties over the mandatory provisions of the Hague Rules. The case concerned a carriage of goods on a Canadian ship from Newfoundland to New York with a bill of lading stating that the contract was to be governed by English law. The cargo was damaged during transport resulting in a dispute whether the exception clause in the bill of lading exempting the carrier's liability was valid.[104]

The Newfoundland Carriage of Goods Act 1932 and the United States Carriage of Goods by Sea Act 1936 were based on the Hague Rules. However, the Newfoundland Act contained a requirement that a paramount clause was to be added in each bill of lading in order for the Hague Rules to apply.[105] The Hague Rules provide a minimum standard for carrier liability, thus, clauses in bills of lading relieving the carrier from liability over the minimum standards are to be held void.[106] Accordingly, the exemption

[100] George A. Zaphiriou, 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements', (1978) 3(2) *Maryland Journal of International Law* 311, 316
[101] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 223
[102] Trevor C. Hartley,*'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) pp. 180-181
[103] *Vita Food Products Inc v Unus Shipping Co* [1939] A.C. 277
[104] George A. Zaphiriou, 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements', (1978) 3(2) *Maryland Journal of International Law* 311, 312
[105] William Tetley, Q.C., 'Vita Foods Products Revisited (Which Parts of the Decision Are Good Law Today?)', (1992) 37 *McGill Law Journal* 292, 296
[106] The Hague Convention Article 3(8)

clause should have been held invalid. However, the court found that according to the parties' stipulation in the contract, English law was to apply, and although bills of lading should contain a paramount clause, it was not mandatory, and thus, did not declare the exemption clause void. Consequently, this ruling stated that a carriage of goods between two states, which had both adopted the Hague Rules escaped their application and put emphasis on the parties intention to have the English law apply. Moreover, this ruling set a precedent that the intention of the parties concerning the applicable law is determinate when deciding on the governing law of the contract, even though the chosen law has no real connection to the transportation itself.[107]

The significance of the *Vita Food Products* is even today high, particularly to countries like the United States and Canada, which have not adopted the Hague-Visby Rules[108] and to the UK, which even made a reservation in relation to the rules of the Rome Convention.[109] However, concerning states that have adopted the Hague-Visby Rules, there is no longer a need for a paramount clause.

The *Vita Food Products* case has created serious criticism, since accordingly the Hague Rules are only directory and not mandatory. However, based on the wording of several articles of the Hague Rules, it is tenable that the Rules are intended to be mandatory.[110] Additionally, the overall goal of the Maritime Conventions is to unify the rules regulating international carriage of goods by sea.[111] Therefore, it would be unpractical to make the rules of the Convention not mandatory, especially regarding exemption clauses that pursue to object to the overall purpose of the Convention. However, in the fight for party autonomy, considering the rules of the Convention only directory, instead of mandatory, would enhance the parties' freedom to choose the applicable provisions for their contract.

The *Vita Food Products* presents the unpredictability of the English courts when it comes to contractual clauses. The case law, in addition to judicial debates, present a real threat for the systematic application of conflict of law clauses. Although, the *Vita Food Products* is not an actual binding precedent, it does raise some concerns for the unified application of contractual clauses. Although, this is only one court case that took place decades ago, it can still be looked at as a good example of the judicial practice of the

[107] George A. Zaphiriou, 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements', (1978) 3(2) *Maryland Journal of International Law* p. 312-313
[108] The Hague-Visby Rules Art 10 states that the provisions of the Hague-Visby Rules shall apply by force of law to all bills of lading issued in any of the Contracting States
[109] William Tetley, Q.C., 'Vita Foods Products Revisited (Which Parts of the Decision Are Good Law Today?)', (1992) 37 *McGill Law Journal* 292, 294
[110] The Hague Rules Article 2, Article 8(3),
[111] Francesci Berlingieri, *'The Travaux Ppéparatoires of the Hague and Hague-Visby Rules'*, Allan Philip (ed), Comite Maritime International (1997) 16

English courts. It strongly evidences the tendency of the English courts to put emphasis on the will of the parties, which should definitely be taken into consideration when negotiating a carriage contract with an English party or choosing the UK to be the proper forum under a jurisdiction agreement.

Furthermore, the *Vita Foods Products* case presented the significance of the principle of good faith, *bona fide*[112]. Accordingly, English courts will not uphold a choice of law, which is not in accordance with the principle of *bona fide* or is against public policy.[113] Although, the principle of good faith is more closely connected with the civil law system, the obligation to abide by promises and agreements has been acknowledged also in some common law countries, such as the UK[114], as expressed in the Vita Foods case.[115] In theory, the requirement that a choice of law agreement must be made in good faith described by the *Vita Foods Products* case, can prevent cases of evasion of the law. Regardless, of the case being dependent on formal validity of the agreement, the *bona fide* doctrine might still be the deciding factor. Although, *Vita Foods Products* presented a limitation on the autonomy of the parties, this limitation did not prevent the parties from relying on freedom of contract, and thus the parties were allowed to refrain from the Hague Rules.[116]

However, in *the Fehmarn* case[117], the English court took another direction from the *Vita Foods* ruling and rejected a forum clause in the bill of lading stating that all disputes were to be judged in the U.S.S.R. The case concerned an English company that had received a shipment in London from a Russian organization. The shipment was carried onboard a vessel owned by a German company, and loaded at the port in Russia. Once discovered that the cargo was damaged, the plaintiffs filed a claim against the German carrier in England. The defendants pursued to stay the proceedings based on the forum clause in the bill of lading. The English court ruled that based on admiralty jurisdiction, the court was allowed to overrule the jurisdiction clause. The English court stated that, since most of the evidence and witnesses were in England, and there would not be any conceivable hardship to the defendants to have the case judged in England, as compared to staying the proceedings and starting new proceedings in Russia would cause further delay and costs, therefore, the defendants' motion was denied.[118] This ruling presents the

[112] The principle of good faith is established in Article 31.1. of the Vienna Convention on the Law of Treaties (Vienna 1969)
[113] Jan-Jaap Kuipers, *'EU law and Private International Law: The Interrelationship in Contractual Obligations'* (Martinus Nijhoff Publishers 2012) 163
[114] Malcolm A. Clarke, ' International Carriage of Goods by Road: CMR' (5th edn, Informa Law 2009) 12
[115] The principle of good faith is also closely related to the principle of *pacta sund servanda* (contracts must be kept) followed by English law
[116] J. J. Fawcett, 'Evasion of Law and Mandatory Rules in Private International Law', (1990) 49 (1) *Cambridge Law Journal* 44, 48
[117] *The Fehmarn* [1958] 1 W.L.R. 159 (C.A.)
[118] Brunson MacChesney, 'Judicial Decisions, (1958) 52(1) *The American Journal of International Law* 120, 133

practice of the English courts, that despite generally giving effect to the parties' intentions, it is the prerogative of the Court to decide on the merits of the jurisdiction agreement and whether to support it.

The applicability of the international rules of the Maritime Conventions regarding a jurisdiction clause in a bill of lading was discussed in the famous case *the Hollandia*[119]. The dispute was about whether a stipulation in a bill of lading on the applicable law and chosen venue can override the application of the Hague-Visby Rules in relation to the limitation of liability of a carrier in case of damage to the goods. The case concerned a shipment of machinery from Scotland to the Netherlands. The Dutch carriers issued a bill of lading stating that the governing law of contract was Dutch law, in addition to proper forum being the court in Holland. The cargo was damaged during transit and the shippers brought actions in England against a sister ship of the Dutch vessel, the *Hollandia*. The carriers filed for a stay relying on the jurisdiction agreement.[120] Since at the time, the Hague-Visby Rules were applied in England, but the Netherlands had not ratified them, the amount of minimum liability of the carrier would had been much lower if the case had been judged in a Dutch court. Notwithstanding, the English Court declined stay of proceedings based on the Hague-Visby Rules having the force of law in England. Since the Rules establish that any clause in a contract of carriage lowering the liability of the carrier would be considered null and void in the UK, the forum clause referring to a jurisdiction that would decrease the carrier's liability cannot be held valid. Otherwise, mandatory British law could be circumvent by a choice of law agreement combined with a jurisdiction clause.[121]

A jurisdiction clause under English law pursues to avoid several proceedings. In *Donohue v Armco Inc*.[122] the House of Lords evaluated, whether an exclusive English jurisdiction clause allowed for an anti-suit injunction in a proceeding that had commenced earlier in a court in New York. The House of Lords found that the Court is allowed to exercise discretion when determining that there are no grounds to grant an injunction based on the jurisdiction clause. Accordingly, in order to avoid parallel hearings, the House of Lords rejected the claim for an injunction, and ordered the proceedings to be continued in New York.[123]

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[119] *The Hollandia* [1982] 2 W.L.R 556
[120] J.G. Collier, 'Conflict of Laws Carriage of Goods by Sea – Hague-Visby Rules – Contracting Out' (1982) 41(2) *The Cambridge Law Journal* 253, 253
[121] Trevor C. Hartley,*'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 188
[122] *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 (HL)
[123] William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 2599

This procedural order was also established by the ECJ in *Erich Gasser GmbH v MISAT Srl*[124]. The ECJ found that in case of same proceedings commenced in two courts of different EU Member States, the court seized second must stay its proceedings until the first court has declared whether it has jurisdiction, notwithstanding, of the jurisdiction clause in the contract granting exclusive jurisdiction to the court seized the case second. Therefore, it is in the competence of the court seized first to examine the validity of the jurisdiction clause.[125] However, based on Brussels I and the case law of the ECJ[126], anti-suit injections are rarely granted to protect English jurisdiction in cases where the other forum is located in another EU Member State.[127]

Occasionally, a court might be faced to interpret the validity of a contractual clause, which is not contained in the carriage contract, but in another contract, that often being the case with charterparty bills of lading. In *Thyssen Inc. v M/A Markos N*[128], an arbitration clause not included in the bill of lading was incorporated from a charterparty. Consequently, the plaintiff consignee was not aware of the arbitration clause referring to arbitration in London until the defendant shipowner raised it as a defense in the proceedings. The US District Court found that since the plaintiff was relying on the bill of lading to support the claim, the arbitration clause was also binding upon the plaintiff, regardless of not having been aware of the existence of the clause. The court also found that since an agent of the master of the vessel had signed the bill of lading, it was binding upon the vessel owners.[129]

Interestingly, in this case both parties were considered bound by the arbitration clause, despite neither of them having signed the charterparty. Accordingly, it is the task of the court seized with the case to evaluate whether the forum clause is enforceable.[130] It is common in carriage of goods disputes to concern the effect of a forum clause incorporated from another contract. However, further difficulty arises when various countries regard the situation in a different manner.[131]

Since common law countries, including the UK, have been inclined to apply the doctrine of *forum non conveniens*, it is vital to bear this in mind when choosing the proper forum for the dispute, especially

[124] C-116/02 *Erich Gasser GmbH v MISAT Srl* [2004]
[125] *Ibid*., paras 42-49
[126] See e.g. Case C-159/02 *Turner v Grovit* [2004] para 31
[127] William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 2599
[128] *Thyssen v M/V/Markos N* [1999] AMC 2515 (SDNY 1999)
[129] For *Thyssen v M/V/Markos N*, see e.g. Forrest Craig, 'The Hague Convention on Choice of Court Agreements: The Maritime Exceptions', (2009) 5 (1) Journal of Private International Law 491, 498
[130] Forrest Craig, 'The Hague Convention on Choice of Court Agreements: The Maritime Exceptions', (2009) 5 (1) Journal of Private International Law 491, 498
[131] *Ibid*., 499

when the carriage contract has a connection to a common law country. Notwithstanding, since England has some of the best experts within the field of sea transport, the chosen forum is often selected to be the court of England, and the chosen law to be English law. In addition, English jurisdiction is often preferred due to its speed and finality of justice. Nevertheless, the chosen jurisdiction may still be reviewed with the discretion of the English court, while the claim is being filed, to determine if a more appropriate and convenient venue exists somewhere else.

3 Is there a conflict between EU law and the Transport Conventions?

The following chapter presents the legislative framework regulating jurisdiction clauses. The most essential international conventions regulating maritime transport are the Hague, the Hague-Visby and the Hamburg Rules, in addition to the Rotterdam Rules, which have not yet entered into force. Naturally, in carriage of goods by sea concerning an EU Member State, the applicable EU regulations play a vital role. In relation to jurisdiction issues, the Brussels I Recast needs to be discussed, although, keeping in mind that the Regulation does not affect the application of international conventions governing jurisdiction or enforcement of judgments that the Member State has entered into before March 1, 2002[132]. Consequently, in matters relating to international carriage of goods, the conventions mentioned above often take precedence.

3.1 The legal framework of EU law and international conventions on the enforcement of jurisdiction agreements

Since jurisdiction issues are a vital element in international litigation, there has been several legislative attempts to harmonize this area of law through treaties and EU law. The foundation of the unification of civil jurisdiction originates from Article 220 of the Treaty of Rome[133], which bound the six[134] then existing Member States to create a system for the mutual recognition and enforcement of judgments in civil and commercial matters. Accordingly, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters[135] (hereinafter Brussels Convention) was adopted for this purpose. Later on, all the states, which became parties to the European Community, acceded to the Brussels Convention.[136]

The rationale for a Convention focused on jurisdiction was based on the previously drafted bilateral treaties between the Member States, which contained direct and indirect rules on jurisdiction. It was resolved that adopting common rules of jurisdiction would increase harmonization of laws, enhance legal certainty, improve free movement of judgments, and avoid discrimination.[137] Article 17 of the Brussels Convention regulates the application of jurisdiction clauses by requiring the court of Contracting States

[132] The Brussels I Recast Article 73(3)
[133] The Treaty Establishing the European Economic Community (Rome 1958)
[134] These six states being Belgium, France, Germany, Italy, Luxembourg and the Netherlands
[135] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels 1968)
[136] Adrian Briggs, *'The Conflict of Laws'*, (first published 2002, 3rd edn, OUP 2013) 55
[137] Jenard Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, OJ 5.3.1979, No C 59/6

to give effect to written jurisdiction agreements.[138] In addition, the legal practice of the ECJ has confirmed the importance of having a genuine agreement between the parties regarding the chosen forum.[139] Since all the members of the Brussels Convention are EU Member States, the ECJ has the authority to review cases submitted to it under the Convention.[140]

The Lugano Convention[141], can be seen as a parallel Convention to the Brussels Convention that bounds the states of the EU and of the European Free Trade Area[142]. Once States parties to the Lugano Convention accede to the EU, these states cease to be parties to the Convention and are to follow the jurisdiction rules of the EU.[143] Although, the content of the Lugano Convention is for the most parts identical to the Brussels I, there is an important difference when it comes to the role of the ECJ. While the ECJ may interpret the provisions of the Brussels I under Article 234 of the EC Treaty, it does not have the authority to interpret the Lugano Convention. Notwithstanding, since the negotiations regarding the original Lugano Convention were mostly based on the Brussels Convention, the non-binding relevant interpretations of the ECJ are reviewed by analogy.[144]

Regarding jurisdiction agreements, a court of an EU Member State or a Contracting State to the Lugano Convention is obligated to announce on its own motion that it lacks jurisdiction in a case, where a claim is filed under a contract containing a forum clause for a court of another Member State or Contracting State, and where the defendant has not appeared within the meaning of Article 24 of the Brussels I and Article 18 of the Brussels Convention. However, in order for the court to obey the jurisdiction agreement, it has to make certain that the agreement denying it of jurisdiction exists and is legitimate, and that the subject of the dispute falls within the scope of the agreement.[145]

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[138] See e.g. Case C-71/83 *Tilly Russ v Nova* [1984] ECR 2417–2436, in which the rules of Article 17 were applied to jurisdiction clauses incorporated in the bills of lading.

[139] See e.g. Case C-106/95, *MSG v Les Gravières Rhénanes* [1997] ECR I-911, in which the ECJ found that a jurisdiction agreement can be considered valid when it is found consistent with a practice in the area of international trade or commerce in which the parties are operating

[140] See e.g. Case C-391/95 *Van Uden Maritime BV, Trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I-7122, in which the Supreme Court of the Netherlands submitted a request for a preliminary ruling to the ECJ on the applicability of an arbitration clause in a carriage of goods contract in relation to the Brussels Convention

[141] The Lugano Convention was originally signed in 1988, but it was replaced by the new Lugano Convention in 2007

[142] The Lugano Convention supplements Brussels I by in essence, making the provisions of Brussels I applicable in Norway, Iceland and Switzerland Peter Stone, See e.g. Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 7-8

[143] Adrian Briggs, *'The Conflict of Laws'*, (first published 2002, 3rd edn, OUP 2013) 55-56

[144] Peter Stone, *EU Private International Law: Harmonisation of Laws* (Edward Elgar Publishing, 2006), 15-16

[145] Andrew Bell, *'Forum Shopping and Venue in Transnational Litigation'* (OUP 2003) 212

A significant treaty in selecting the proper forum in international matters has been the Hague Convention [146], which aims to ensure the effectiveness of choice of court agreements in international cases on civil and commercial matters[147]. The content of the Hague Convention mainly resembles the Brussels I Recast, with some exceptions. However, the Hague Convention left out certain areas of regulation due to their particular nature, which included contracts on carriage of passengers and goods.[148] These maritime law related areas were excluded due to being subject to special jurisdiction rules in international conventions applicable specifically to such operations.[149] Notwithstanding, the mere fact that an excluded matter arises as a preliminary question by way of defense does not exclude proceedings from the Convention, if that matter is not an object of the proceedings.[150] Another reason for the exclusion of certain maritime law matters has been that the Hague Convention regulates the rights of third parties. Jurisdiction clauses within contracts of carriage of goods by sea often affect the rights of third parties, who are not parties to the carriage contract, and therefore, the possibility of a conflict of conventions is avoided by excluding maritime matters from the scope of the Hague Convention.[151]

The legal basis of the EU to legislate on issues concerning its Member States is based on the founding EU Treaties applicable in all EU Members States. The EU's competence on conflict of laws rules lies on Article 81 of the Treaty on the Functioning of the European Union[152] (hereinafter TFEU). This provision of the TFEU is focused on the area of freedom, security and justice, and it is the only one concerning judicial cooperation in civil matters.[153] According to the TFEU, the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.[154] The EU has for long aimed at harmonizing the rules on private international law. Since this is an area of law, which specifically connects the EU with the national legal orders of the Member States, the unification has not gone through without attention to specific conflicts rules.

[146] Convention of 30 June 2005 on Choice of Court Agreements, (the Hague 2005). The Convention entered into force on 1 October in the EU, including in all the EU Member States
[147] The Hague Convention Article 1(1)
[148] *Ibid*., Article 2(2)(f)
[149] Department of Justice Hong Kong, *Consultation Paper on the Hague Convention on Choice of Court Agreements* (International Law Division, 2005) 9
[150] The Hague Convention Article 2(3)
[151] Graig Forrest, The Hague Convention on Choice of Court Agreements: The Maritime Exceptions (2009) 5(1) *Journal of Private International Law* 491, 492
[152] Treaty on the Functioning of the European Union (Lisbon 2007) consolidated version (OJ C 326, 26.10.2012)
[153] Aleksandrs Fillers, 'Implication of Article 81(1) TFEU's recognition clause for conflict of laws rules' (2018) 14(3) *Journal of Private International Law* 476, 476
[154] TFEU Article 67(4)

The most important piece of legislation within EU law in relation to civil procedure has been the Brussels I. With a wide scope of application that covers nearly all civil and commercial matters, it regards the most essential elements of international civil litigation; jurisdiction and recognition and enforcement of judgments, and it is one of the most applied regulations by the ECJ.[155] The Brussels I was based on the Brussels Convention, which is still applicable in jurisdiction matters between Contracting States. However, the free movement of judgments in civil and commercial matters, as part of the fundamental basis of the internal market, required a system for cross-border recognition of judgments, which was regulated by a legal instrument that is binding and directly applicable in all EU Member States[156].[157] The Commission preferred a Regulation instead of a Convention in order to ensure that the rules governing jurisdiction and recognition and enforcement of judgments were binding and directly applicable.[158] However, several articles of the Brussels Convention were transferred to the Brussels I unaltered. Consequently, the explanatory Reports of the Convention along with the case law of the ECJ continue to be relevant when discussing the Regulation.[159] Despite the Brussels I having been replaced by the Brussels I Recast, it is still appropriate to discuss some of the jurisdictional elements established by the Brussels I in relation to forum clauses in order to understand the changes that came about with the new Brussels I Recast.

3.1.1 How has the Brussels I Recast clarified the application and recognition of jurisdiction agreements?

Although, the application of Brussels I was a huge step towards resolving disputes on jurisdiction and enhancing recognition and enforcement of foreign judgments, in 2009 the European Commission published a report on the application of the Regulation defining two concerns on how the Brussels I regarded forum agreements. The concerns regarded the protection of exclusive choice of court agreements when parallel proceedings had been initiated in two different courts, and the lack of certainty that choice of court agreements would be respected in transactions between EU Member States and third

[155] Ulrich Magnus, 'Introduction' in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law, Brussels I Regulation* (2nd rev. edn, Sellier European Law Publishers, 2012) 12

[156] Denmark chose to opt out of the Brussels I, however, it entered into a parallel agreement with the European Community 'The Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', which entered into force on 1 July 2007

[157] The Brussels I, Recital 6

[158] Commission Proposal for a Council Regulation (EC) on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, COM (1999) 0348 final 4

[159] See the explanatory reports on the Brussels Convention: Jenard Report (1968), Schlosser Report (1979), Jenard-Möller Report (1988) and on the Lugano Convention: Pocar Report (2007).

countries.[160] Consequently, the EU Parliament and Council adopted a revised version of the Brussels I[161]. The revised Regulation entered into force on 20 December 2012 and has been applicable in all EU Member States from 10 January 2015.[162] The most essential amendments made by the Brussels I Recast concern jurisdiction clauses, concurrent proceedings and the enforcement of judgments.[163]

According to the Brussels I, if at least one of the parties had his domicile in an EU Member State, the court first seized the case could always decide on its own merits whether it was competent in resolving the case regardless of an exclusive jurisdiction agreement referring to another court.[164] Therefore, the purpose and effectiveness of party autonomy and exclusive jurisdiction was disregarded by the chronological rule, which placed the focus on the court first seized.[165] However, according to the Brussels I Recast, a jurisdiction agreement is binding regardless the parties being domiciled in non-EU Member States if the parties have chosen a court or courts of a Member State to be the proper forum to settle the dispute.[166] Notwithstanding, if the parties have selected a non-Member State to be the chosen forum for the proceedings, the Regulation does not apply. In such a case, the validity of the jurisdiction agreement shall be governed by the national law of the chosen forum. Not even the new *lis pendens* rules of the Brussels I Recast should limit the parties' right to choose a third country as the chosen forum.[167]

Based on the Brussels Convention and the earlier Brussels I, the ECJ specified in *Gasser v Misat*, that in case the first proceedings created a *lis pendens* situation in the second proceedings, the *lis pendens* rule of Article 21 of the Brussels Convention, (Article 27 of Brussels I), was applicable and the court first seized was granted precedence.[168] In *Gasser*, the first proceedings were initiated in Italy, while the defendant initiated second proceedings in Austria based on an exclusive jurisdiction agreement referring to the courts in Austria. According to the ECJ, the first court is to declare itself incompetent due to the jurisdiction agreement in order for the proceedings to continue in the forum defined in the agreement. Consequently, the second court must stay proceedings until the first court has declared itself

[160] European Commission, 'Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 COM (2009) 174 final [21.4.2009] 5-6
[161] The Brussels I Recast Regulation is also referred to as the Judgments Regulation
[162] Brussels I Recast Regulation Article 81
[163] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 7
[164] Quim Forner-Deleygua, 'Changes to Jurisdiction based on Exclusive Jurisdiction Agreements under the Brussels I Regulation Recast, (2015) 11(3) *Journal of Private International Law* 379, 383
[165] Hamed Alavi and Tatsiana Khamichonak 'A Step Forward in the Harmonization of European Jurisdiction: Regulation Brussels I Recast', (2015) 8(2) *Baltic Journal of Law & Politics* 159, 168
[166] Brussels I Recast Article 25
[167] Francisco Garcimartin, 'Prorogation of Jurisdiction' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 280-281
[168] Case C-116/02 *Erich Gasser GmbH v Misat srl* [2003] ECR I-1469, para 41

incompetent.[169] Therefore, if the first proceedings were initiated before the proceedings in the chosen forum, the *lis pendens* rule would be applicable to any proceedings initiated in another Member State. However, this could result that if the proceedings were first initiated in the chosen forum, which was not *lis pendens* in the second proceedings due to the jurisdiction clause, the second proceedings would not end before the excluded court would find itself incompetent to review the case. In such circumstances, parallel proceedings might continue for some time, until the second court declares itself incompetent based on the jurisdiction agreement that refers to the first court.[170]

In *Gothaer v Sampskip*, the ECJ ruled that a judgment given by a court in a Member State, in which the court declines jurisdiction based on a jurisdiction clause, is considered *res judicata,* recognized in all the Member States, and accordingly binds the courts of all the other Member States.[171] *The Gothaer* concerned a German company that sold a brewing installation to a buyer in Mexico. The seller contracted with a German carrier to provide the carriage from Antwerp to Mexico. The bill of lading contained an exclusive jurisdiction clause referring to the courts of Iceland. However, due to damage that occurred to the cargo during transport, the insurers of the seller (cargo owner) filed a claim against the carrier in Antwerp. The Belgium court dismissed the claim based on the jurisdiction agreement. Afterwards, the transport insurers and the cargo owner brought proceedings against the carrier in Germany. The carrier responded to the claim arguing that German courts did not have jurisdiction based on the jurisdiction agreement, and that the judgment given by the Belgium court was binding upon the German courts under Brussels I.[172]

The ECJ held that the uniform application of EU law means that the specific scope of the restriction of another Member State's court to review a case must be defined at the EU level, instead of relying on different national rules on *res judicata*. The *res judicata* under EU law provides that a judgment given by a court of a Member State, which has declined jurisdiction on the grounds of a jurisdiction agreement, which it has declared valid, bind the courts of other Member States in relation to a judgment to decline jurisdiction as well as finding a jurisdiction agreement valid.[173]

[169] Case C-116/02 *Erich Gasser GmbH v Misat srl* [2003] ECR I-1469, para 54
[170] Quim Forner-Deleygua, 'Changes to Jurisdiction based on Exclusive Jurisdiction Agreements under the Brussels I Regulation Recast, (2015) 11(3) *Journal of Private International Law* 379, 383
[171] Case C-456/11, *Gothaer Allgemeine Versicherung AG et al v Sampskip GmbH*, [2012] EU:C:2012:719, paras 22-23
[172] *Ibid*., para 43
[173] *Ibid*., paras 39-41

The Brussels I Recast has altered the rules regarding *lis pendens* in cases, which concern the same cause of action between the same parties[174], and proceedings that involve related actions[175]. According to the Brussels I Recast, the court first seized the case shall have precedence to determine jurisdiction while all other Member State courts shall stay proceedings until the validity of the court first seized is established.[176] Consequently, once the jurisdiction of the court first seized is established, all other courts seized shall decline jurisdiction in favor of the first court.[177]

The difference between the old Brussels I and the Brussels I Recast is that now the chosen court may force the court first seized to stay proceedings and decline jurisdiction even when the parties are not domiciled in EU Member States. The prior Brussels I did not require seizure of the chosen court with non-domiciled parties as a precondition for the seized court to stay proceedings until the chosen court had reviewed the case. Consequently, there is no longer 'a race to the court' in order to establish, which court is competent to review the case, since the chosen court may force the court first seized to stay, while the chosen court declares itself competent or incompetent to review the case.[178]

However, this provision has created some difficulties within the interpretation of jurisdiction clauses within common law countries, especially in England, since the designated court may not invoke national rules or doctrines, such as f*orum non conveniens,* to select a more suitable and convenient forum for the proceedings.[179] Although, Article 30 of the Brussels I Recast does grants those courts discretion to stay proceedings or in certain circumstances to decline jurisdiction, this opportunity has not yet been discussed by the ECJ, therefore, the significance of the mentioned discretion remains undetermined.[180]

Although, the Brussels I Recast has clarified some of the complexity regarding jurisdiction agreements, it does not solve all the existing concerns. The Brussels I Recast does not state, how to regulate when the jurisdiction agreement states that one party shall file its claim in one jurisdiction, while the other party may bring its actions in several jurisdictions. Furthermore, the Brussels I Recast does not regulate, whether a Member State court is bound by an exclusive jurisdiction clause referring to a non-Member

[174] Brussels I Recast Article 29
[175] *Ibid*., Article 30
[176] *Ibid*., Article 29(1)
[177] *Ibid*., Article 29(3)
[178] Quim Forner-Deleygua, 'Changes to Jurisdiction based on Exclusive Jurisdiction Agreements under the Brussels I Regulation Recast, (2015) 11(3) *Journal of Private International Law* 379, 385
[179] Francisco Garcimartin, 'Lis Pendens and Related Actions' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 283
[180] *Ibid*., 322

State court.[181] When the parties have chosen a third State to be the chosen forum, the Brussels I Recast is not applicable, in which case, the court examining the validity of the jurisdiction clause is bound by the national rules of the chosen forum. Additionally, the doctrines on *lis pendens* and *forum non conveniens* might be applicable depending on the court reviewing the issue of jurisdiction.

3.1.2 The requirements for a valid jurisdiction agreement under the Brussels I Recast

The parties to the contract may enter into agreements stipulating a specific court or courts to have jurisdiction in case of dispute, according to Article 25 of the Brussels I Recast, which regulates the formal and material validity of jurisdiction agreements and their effects.[182] According to the ECJ: *"Article 25 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Brussels I Regime"*[183]. Accordingly, the provision emphasizes the principle of party autonomy and freedom of contract in jurisdiction rules of the Member States.[184]

According to Article 25, the jurisdiction agreement must be either:

a) *"in writing or evidenced in writing;*
b) *in a form which accords with practices which the parties have established between themselves; or*
c) *in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such a trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."*[185]

Article 25 of the Brussels I Recast differs from Article 23 of the original Brussels I in the following. First, Article 25(1) defines a jurisdiction clause valid indifferent of the domicile of the parties to the contract, and accordingly, applies despite all the parties to the dispute being domiciled in a non-EU

[181] James Gosling, Rebecca Warder and Tessa Jones Huzarski 'Chapter 17 England & Wales' in James Gosling and Tessa Jones Huzarski (eds) *The Shipping Law Review*, (3rd edn, Law Business Research 2016) 169
[182] Brussels I Recast Article 25
[183] See e.g. Case C-23/78, *Meeth v Gracetal* [1978] ECR 2133, para 5 or Case C-387/98, *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337, para 14
[184] Francisco Garcimartin, 'Prorogation of Jurisdiction' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 279
[185] Brussels I Recast Article 25(1)

Member State.[186] Secondly, the new Article 25(1) expressly refers the substantive validity of a jurisdiction agreement to the law of the Member State, whose court is indicated in the agreement. Thirdly, Article 25(5) states a jurisdiction clause to be independent of other terms of the contract, which is a new provision, since that statement along with the material validity of a jurisdiction agreement did not exist in the earlier Brussels I.[187]

A valid jurisdiction agreement must fulfill any of the three formal requirements mentioned above, but above all, the assigned jurisdiction must be expressed in an agreement between the parties. The formal requirements for a valid jurisdiction agreement guarantee the real consent of the parties to the contract and provide proof of such consent. While the formal requirements aim to provide proof of the consent of the parties by ensuring that a jurisdiction clause does not go unnoticed, they also protect legal certainty by determining in advance which court will have jurisdiction, thus, enhance foreseeability.[188]

a) An agreement concluded in writing

The first option stipulates that the parties to the agreement have indicated their consent in writing. In practice, this requires the signatures of the parties. The jurisdiction clause may be in a separate document signed by both parties, in a contract including other clauses signed by both parties, or in several documents referring to the forum agreement where each document is signed by a party, for example, in an exchange of letters or telegrams. However, a document that solely holds a company stamp is not sufficient despite the other party having signed it, although, the application of a company seal may be adequate. Furthermore, mere confirmation of the acceptance of an offer that includes the forum clause is not sufficient, even though the acceptance is expressed in writing.[189]

It is common practice to incorporate jurisdiction agreements into a standard form drafted by one of the contractual parties. However, certain criteria must be fulfilled in order for the formal requirements for a valid jurisdiction clause to be met.[190] The ECJ found in *Estasis Salotti v RÜWA* that the requirement '*in writing*' can be fulfilled when the agreement signed by both parties includes, by express reference, another document containing a jurisdiction clause, and in addition, the clause must be examined by a

[186] The prior Brussels I required at least one of the parties to be domiciled in an EU Member State, however, this restriction has been removed, along with the old Article 23(3), which granted a limited effect to a jurisdiction clause if none of the parties were domiciled in a Member State.
[187] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 171
[188] Francisco Garcimartin, 'Lis Pendens and Related Actions' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 287
[189] *Ibid*., 288
[190] *Ibid.*

party exercising reasonable due care.[191] In this case, the ECJ found that a chain of express references is admissible, for example, from the agreement to an earlier written offer and from there to a standard form including a forum clause. However, the Court emphasized that the reference or chain of references must be express and that the party relying on the forum clause must have taken reasonable steps to bring the clause in question to the knowledge of the other party.[192] This is especially important when the forum clause is included in the bill of lading and the consignee becomes bound by the clause in question. It is essential that the consignee is aware of the jurisdiction clause, and therefore, the inclusion of such general terms must be properly communicated to the consignee.[193]

The criteria created by the ECJ can be divided into two requirements; the party pursuing to use standard terms must have distinctly expressed these terms to be part of the agreement; and the other party must have had a reasonable opportunity to review those terms before signing the agreement. These conditions are based on the idea that the content of the jurisdiction agreement was decided at the time the contract was concluded and the other party was, or should have been, aware of the existence and subject matter of the jurisdiction clause. However, these requirements are not fulfilled if the standard terms are delivered to the other party without specifically referring to them in the main agreement.[194]

There has been discussion in judicial practice whether general words in a bill of lading incorporating the terms of a charterparty can be extending to a jurisdiction clause. In *Siboti v Bp France*, the English court found that general wording was insufficient to include a charterparty arbitration clause into a bill of lading. The court concluded that in order for the arbitration clause to be valid, it had to represent a consensus between the parties, which in this case could not be presented clearly and precisely enough.[195]

An agreement concluded by electronic means can be considered an agreement in writing.[196] The key factor is that the electronic communication can be durably stored in a manner that it can be reproduced later, for example, e-mails fulfill this condition. In relation to standard terms, according to the

[191] Case C-24/76, *Estasis Salotti v RÜWA* [1976] ECR 1831, para 13
[192] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 172
[193] See *Stork Colorproofing v Ofmag*, 23rd Febuary 1994 (French Court of Cassation), in which failure to communicate that the general conditions included a forum clause made a chain of express references, including the forum clause invalid
[194] Francisco Garcimartin, 'Lis Pendens and Related Actions' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 288-289
[195] *Siboti v BP France* [2003] 2 Lloyd's Rep 364
[196] Brussels I Recast Article 25(2)

jurisprudence of the ECJ, there must be an express reference to the standard terms in the e-mail, in addition to these terms being accessible and capable of being stored before the agreement is concluded.[197]

b) An agreement evidenced in writing

The ECJ has found that when there has been no agreement 'in writing', only one of the parties has presented to the other party a document to confirm the conclusion of an oral contract including a forum clause, for the forum clause to fulfil the requirement of 'in writing', it must be evidenced that the oral agreement actually existed and that it explicitly included a forum clause.[198]

In *Tilly Russ v* Nova, the ECJ stated; *"if the jurisdiction clause has been the subject of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement"*.[199] Consequently, an oral agreement may in certain circumstances be accepted as an agreement in writing. However, in relation to carriage of goods, since the bill of lading is an evidence of the carriage contract, therefore, it must contain the necessary contractual terms, including a possible jurisdiction clause, in order for the third party receiver of the bill of lading to be able to rely on such terms.[200]

c) Practice established between the parties to the contract

This alternative, which is a reference from the United Nations Convention on Contracts for the International Sale of Goods[201] (hereinafter CISG), is based on practices that the parties have established in their prior engagements.[202] This requirement makes a bilateral agreement binding between the parties without the agreement being in writing. However, the parties must have been engaged in a minimum amount of commercial practice between one another on a regular basis and in a manner conforming to a certain practice. In such case, the principle of good faith justifies a party's reliance on the validity of the jurisdiction agreement. However, the focus is on the consensus of the parties to agree on the terms of the contract, regardless of the agreement being based on general practice instead of a written contract.[203]

[197] Francisco Garcimartin, 'Lis Pendens and Related Actions' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 289-290
[198] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 173
[199] Case C-71/83 *Tilly Russ v Nova* [1984] ECR 2417, para 19
[200] The position of a third party holder of a bill of lading is discussed in more detail in Chapter 4.2
[201] The United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980)
[202] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 174
[203] Francisco Garcimartin, 'Lis Pendens and Related Actions' in Andrew Dickinson and Eva Lein (eds) *The Brussels I Regulation Recast* (OUP 2015) 291

Accordingly, there can be no valid jurisdiction agreement unless both parties are aware of its existence. Furthermore, the notion of 'bilaterally established practice' must be interpreted independently and based directly on the facts without referring to any specific national law.[204]

d) Usage in international trade and commerce

The fourth option refers to a jurisdiction agreement, which is based on international trade or commercial usage, of which the parties are or ought to have been aware. A 'usage' is presumed to exist when the parties conduct is consistent with a usage, which is being regularly followed in certain types of contracts when operating in the particular field of international trade or commerce.[205]

In *Castelletti v Trumpy*, the ECJ found that this requirement may be relied upon when a jurisdiction clause is incorporated among the clauses printed on the back of a bill of lading while the parties' signatures are on the front of the transport document. The ECJ held that compliance with relevant usage established the existence of a valid jurisdiction agreement. The existence of usage must be determined in relation to the branch of trade or commerce, in which the parties operate, when it is established that a particular course of conduct is generally and regularly followed by operators in that branch when concluding particular types of contracts.[206] Furthermore, a usage does not cease to be usage, in case the validity of the jurisdiction agreement is contested by several shippers and/or endorsees of bills of lading by bringing proceedings before other courts than the ones designated, if it is established that such practice extends to a usage which is generally and regularly followed.[207]

The ECJ added in *MSG v Les Gravières Rhénanes* that even though one of the parties did not react when faced with a commercial letter of confirmation from the other party that included a pre-printed reference to a jurisdiction clause, or when one of the parties repeatedly paid without objection invoices issued by the other party containing a reference to a forum clause, a jurisdiction agreement can still be considered valid when it is found consistent with a practice in the area of international trade or commerce where the parties are operating in, contingent on the parties being aware of this practice.[208]

In *MSG* and *Castelletti*, the ECJ established that the concept of international trade or commerce has a wide scope, which includes a contract between two companies established in different Member States

[204] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 174
[205] Case C-159/97, *Castelletti v Trumpy* [1999] ECR I-1597, para 21
[206] *Ibid*., para 30
[207] *Ibid*., para 29
[208] Case C-106/95, *MSG v Les Gravières Rhénanes* [1997] ECR I-911, para 20

for the carriage of goods by river. For example, *MSG* concerned a time-charterparty of a vessel by a German company to a French company for transportation that mainly took place between French ports. Additionally, it can include a contract for the carriage of goods by sea between different States that are not necessarily Member States; as in *Castelletti*, which concerned a bill of lading agreement for the carriage of goods from Argentina to Italy.[209]

Furthermore, the ECJ focused on the existence of usage, which is to be determined based on a standard of the EU in relation to the branch of international trade or commerce in which the parties to the contract operate, not based on national laws of Member States nor in reference to international trade or commerce in general. The relevant branch must be established in terms of substance and location, as in *Castelletti*, the Court held that the practice in question does not need to be established in specific countries or within all the Member States, but it is sufficient that it exists within the branch where the parties to the contract operate in. Moreover, the ECJ has removed any requirement of actual or presumptive awareness of the usage as long as awareness is established whenever in the branch of trade or commerce, which the parties operate in, a specific course of conduct is generally and regularly followed when concluding a particular form of contract in a manner that can be considered established usage.[210] In *Elefanten Schuh v Jackmain*, the ECJ confirmed that the Member States may not demand additional formalities in addition to the ones defined in Article 25.[211] For example, that the jurisdiction agreement be drafted in a specific language is not considered an acceptable requirement.[212]

e) Material Validity

The earlier Brussels I did not contain any regulations on material validity of a jurisdiction agreement, however, the Brussels I Recast added a provision in this regard. Even when a jurisdiction agreement fulfills all the formal requirements, it may lack material validity due to excessive scope, subject matter that falls outside of its scope or due to insufficient consent. Notwithstanding, the chosen forum does not need to be connected with the parties, the subject matter or the dispute in any other way.[213]

The material validity of a jurisdiction clause is determined based on the law of the Member State of the chosen court. Therefore, the material validity that may declare a jurisdiction clause null and void, is

[209] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 175
[210] *Ibid*., 175-176
[211] Case C-150/80, *Elefanten Schuh v Jackmain* [1981] ECR-1671, para 26
[212] Case C-159/97, *Castelletti v Trumpy* [1999] ECR I-1597, para 52
[213] Peter Stone, *'EU Private International Law'* (3rd edn, Edward Elgar Publishing, 2016) 178

subject to applicable conflict of law rules, which are determined either based on the national law of the Member State of the chosen court (*lex fori*); by the law of the contract (*lex contractus)*, or by a different law. However, in practice, the law of the chosen court is the law applicable to the main contract, since the parties generally choose the law of the chosen forum to be the law of the contract (*lex contractus*).[214]

f) The independence of a jurisdiction agreement from the main contract

A jurisdiction agreement, which forms part of a contract, shall be treated as an independent agreement separate of other terms of the contract. Moreover, the validity of the jurisdiction agreement cannot be challenged solely on the grounds of the main contract being invalid.[215] This requirement was confirmed by the ECJ in *Francesco Benincasa v Dentalkit Srl*, in which the Court held that the validity of a jurisdiction clause is to be assessed separately from the main contract, therefore, the invalidity of the main contract did not automatically declare the jurisdiction clause void.[216]

3.2 The conflict between EU law and *forum non conveniens* in the interpretation of jurisdiction agreements

A clear conflict between EU regulations with the English law in relation to jurisdiction clauses exists in the interpretation of the *forum non conveniens* doctrine. As discussed in Chapter 2, the *forum non conveniens* doctrine lies deep in the British legal tradition and is not easily ignored by the British courts.

The issue was assessed and referred to the ECJ by the English court in *Re Harrods (Buenos Aires) Ltd* case[217], in which the English Court of Appeal found that it had jurisdiction to order a stay of proceedings based on *forum non conveniens* and to send the case to a more appropriate forum to a State not party to the Brussels Convention. The House of Lords referred the case to the ECJ regarding the compatibility of the *forum non conveniens* doctrine with the Brussels Convention. However, the case was revoked from the ECJ, when the case was settled.[218] Notwithstanding, the English courts have relied upon *Re Harrods* to support their discretionary authority to grant *forum non conveniens* stays against defendants domiciled

[214] Jan Aminoff, '*The Provisions on Jurisdiction of the Brussels I regulation Recast and Carriage of Goods – the Role of the Court of Justice of the European Union*', Licentiate Thesis, (2017) *University of Helsinki* 84
[215] Brussels I Recast Article 25(5)
[216] Case C-269/95, *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767, paras 29-32
[217] *Re Harrods (Buenos Aires) Ltd* [1992] Ch 72
[218] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 230-231

within EU Member States in favor of third countries. In some instances, these decisions have concerned jurisdiction clauses referring the dispute resolution to non-Member States[219].

Later, the ECJ has found the doctrine to be inconsistent with the Brussels Convention, when the dispute concerns two or more EU Member States. The ECJ discussed the matter in a much referred case, the *Owusu v Jackson*[220], which concerned a British national Owusu domiciled in the UK, who suffered an accident during a holiday in Jamaica, while diving near the beach. Owusu filed a claim in the UK for breach of contract against Jackson, also domiciled in the UK, who had rented Owusu a holiday villa in Jamaica. Owusu claimed the agreement stating in implied terms that the beach would be reasonably safe from hidden dangers. In addition, Owusu brought actions in tort in the UK against four Jamaican companies for failing to warn swimmers of possible dangers.

The Jamaican defendants argued that the proceedings should take place in Jamaica, since the case had closer links to Jamaica, and that the Jamaican court would be the most suitable forum, for the case to be tried in the interests of all the parties and the ends of justice. The English court found that there were no grounds to stay proceedings against Jackson domiciled in the UK. However, regarding the other defendants, the court found that since the Brussels Convention prevented the court from staying proceedings against Jackson, the court was also unable to stay proceedings against the other defendants, since otherwise the courts in two jurisdictions would result in trying the same factual issues upon similar evidence and possibly reach a different conclusion. Accordingly, the court found that the UK was the correct forum for the proceedings.

The defendant appealed arguing that the Brussels Convention cannot impose obligation on a court of a State that is not a party to the Convention. The claimant argued that based on Article 2 of the Brussels Convention being mandatory, the English court cannot stay proceedings in the UK against Jackson, who is domiciled there, even if the English court finds another forum in a non-Contracting State to be more appropriate for reviewing the case.

The English court referred the matter to the ECJ for a preliminary ruling on the mandatory nature of Article 2 of the Brussels Convention in relation to a court of a Contracting state exercising discretionary power under its national law to refuse to conduct proceedings against a person domiciled in that State in

[219] See e.g. *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382 (CA), where an English court supported an Egyptian choice of law clause in a dispute, where an English defendant was sued in England

[220] Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal- Inn Villas" and Others* [2005] I-1445

favor of the courts of a non-Contracting State, when the proceedings have no connecting links to other Contracting States.[221] The ECJ held that Article 2 of the Brussels Convention applies when concerning relationships between courts of a Contracting State and those of a non-Contracting State.[222] As for regarding the compatibility of the *forum non conveniens* with the Brussels Convention, the ECJ stated that since Article 2 of the Convention is mandatory, there can be no exception on the basis of the *forum non conveniens* doctrine. Furthermore, it would jeopardize the principle of legal certainty, one of the objectives of the Brussels Convention, if the court that has jurisdiction under the Convention would be allowed to apply the doctrine of *forum non conveniens*.[223] The ECJ found that the defendants' arguments in favor of *forum non conveniens*, are not suitable to derogate from the mandatory nature of Article 2 of the Convention.[224] Consequently, the ECJ ruled that the Brussels Convention prevents a court of a Contracting State from refusing the jurisdiction conferred on it by the Convention on the basis that a court of a non-Contracting State would be a more appropriate forum for the proceedings.[225]

This ruling demonstrates the approach of the ECJ towards *forum non conveniens*. Since the doctrine still holds a significant place within jurisdiction issues in the UK, it presents a conflict between English law and the EU regulations. Notwithstanding, when the parties to the contract have chosen an EU Member State as their chosen forum, it is mandatory to apply the relevant EU regulations, despite one of the parties asking the English court to apply the *forum non conveniens* doctrine in order to stay proceedings in favor of a more suitable forum.

However, whether the Brussels instruments forbid the courts of Members States from applying the doctrine in all circumstances or only in some, still remains unclear. The drafters of the Brussels Convention and the Brussels I have not addressed the issue of *forum non conveniens* stays. None of the original Member States accepted the doctrine, and therefore, presumably the issue was not discussed during the negotiations. Consequently, several unanswered questions remain regarding the scope of application of the Brussels regimes, and whether national courts have the discretion to grant *forum non conveniens* stays in certain circumstances.[226]

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[221] Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal- Inn Villas" and Others* [2005] I-1445, para 22
[222] *Ibid*., para 35
[223] *Ibid*., para 37-38
[224] *Ibid*., paras 44-45
[225] *Ibid*., para 46
[226] Arthur T. von Mehren, *'Adjudicatory Authority in Private International Law; a comparative study'* (Brill Academic Publishers 2007) 338

Since many carriage of goods by sea contracts have a connection with the UK, as English courts being the chosen forum or by English law being the governing law of the contract, it is not unlikely for the issue of *forum non conveniens* to come about in a dispute regarding carriage of goods. How the courts will address this issue is not entirely obvious, especially since in the *Owusu* case, the ECJ did not answer whether EU law precludes the application of *forum non conveniens* in all circumstances or only in some. Accordingly, the doctrine might still become applicable depending on the individual circumstances of each case.[227]

Notwithstanding, the application of the *forum non conveniens* is not completely extinct. Although, the *Owusu* decision and the judicial practice of the ECJ have incorporated civil law concepts of *lis pendens* and jurisdictional 'certainty' on the common law system, the doctrine of *forum non conveniens* continues to evolve within the UK courts. However, with the adoption of the Brussels I Recast, EU law with its civil law elements is gaining ground over the English principle. It is likely that the doctrine will mainly continue to be relevant when the proceedings take place against defendants domiciled in non-EU Members States in addition to the chosen forum being outside the EU.[228]

As in *Xin Yang and An Kan Jiang*[229], the English court found that since the defendant was not domiciled in a state party to the Brussels Convention, the English court first seized could stay proceedings, when the defendant had later brought actions in the Netherlands. Since the English court found the dispute to be outside of the scope of the Brussels Convention, it had the authority to use its discretion, and based on the doctrine of *forum non conveniens*, to determine the Dutch court to be more appropriate. However, had the Brussels Convention been applicable, the English court would have had to continue the proceedings.[230] Although, some of the facts of the *Xing Yang* case compared to the *Owusu* case are the same, the main difference lies with the defendant not being domiciled in a Contracting State, as compared to *Owusu,* in which Jackson the defendant, was domiciled in the UK.

[227] Case C-281/02 *Andrew Owusu v N.B. Jackson, trading as "Villa Holidays Bal- Inn Villas" and Others* [2005] I-1445, paras 50-52
[228] Ronald A. Brand and Scott R. Jablonski '*Forum Non Conveniens: History, Global Practice, and Future under the Hague Convention of Choice of Court Agreements'* (OUP 2007) 35
[229] *The Xing Yang and An Kan Jiang* [1996] 2 Lloyd's Rep 217
[230] Hannu Honka, 'Jurisdiction and EC Law: Loss of or Damage to Goods' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*'(Kluwer Law International 2005) 269

3.3 Are mandatory jurisdiction provisions in the Maritime Conventions an obstruction to freedom of contract?

The Maritime Conventions contain mandatory provisions that limit the parties' freedom of contract by being applicable in a contractual relationship regardless of the will of the parties. A mandatory rule is meant to protect the weaker party by ensuring that one of the parties may not take advantage of the other party's weaker position, by attempting to evade the law.[231] In order for the carrier not to be able to avoid the mandatory provisions of a convention with forum and conflict of law clauses, the conventions often contain regulations, which limit the proper jurisdiction to states parties to the Convention. The idea behind it has been that the Contracting State has an obligation to apply the rules of the Convention, while a state not party to the Convention might not see the relevance of applying such. The carrier is not allowed to circumvent mandatory liability provisions with forum and conflict of law clauses that refer to states that are not parties to the Convention. However, states may accept new protocols and amendments to Conventions at different stages. Therefore, when contracting with a party from a foreign state, it is vital to acknowledge, which conventions the other state has ratified, accordingly, which are applicable in the carriage contract, since there are divergences in the different transport conventions regarding liabilities and the amount of liability limitations, in addition to provisions on jurisdictions.[232] However, when interpreting the wording of international carriage of goods by sea through the Hague and Hamburg Rules, it seems clear that certain provisions are intended to be mandatory.[233] However, since these two conventions are primarily liability conventions, the mandatory provisions target the issues regulating the liability of the carrier.[234]

The justification for the mandatory provisions of the Hague Rules are based on public policy; the carrier is not permitted to derogate in its favor from the liability obligations of the Convention.[235] At the time of the drafting of the Hague Rules, the emphasis was on protecting the rights of the shippers, however, this seems to have shifted nowadays, since presently shippers are multinational companies with significant bargaining power, it may be the cargo owner, who prescribes the terms of the carriage contract.

[231] J. J. Fawcett, 'Evasion of Law and Mandatory Rules in Private International Law', (1990) 49 (1) *Cambridge Law Journal* 44, 58
[232] Lena Sisula-Tulokas, *'Kuljetusoikeuden perusteet'*, (3rd edn, Talentum 2007) 51-52
[233] The Hague Rules Article 3(8) and Hamburg Rules Article 23 state that any stipulation in the contract of carriage is null and void to the extent that it derogates from the provisions of those Conventions to the detriment of the shipper or the consignee
[234] Alexander von Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, (Kluwer Law International 2005) 94
[235] *Ibid*., 95

Therefore, there is no longer a need to provide extra protection for the shippers, especially when looking at the law of carriage of goods by sea as part of commercial law, which should focus on freedom of contract, negotiations between two equally powerful commercial entities and on the laws of the markets.[236]

Another party that seems to be in need of protection is the consignee, the buyer of the goods, since he usually has no possibility to influence the terms of the carriage contract, but has to accept the terms in the bill of lading without further negotiations.[237] Furthermore, most mandatory jurisdiction provisions are designed to protect consumers. Accordingly, they prescribe mandatory jurisdiction at the consumer's domicile or residence. However, as described above, this is not the case with the Maritime Conventions.[238] Neither the Hague Rules nor the Hague-Visby Rules contain provisions on jurisdiction clauses in relation to cargo claims. Notwithstanding, such agreements have generally been considered valid by courts in bills of lading disputes, provided the terms of the agreement have been clear and unambiguous.[239]

The reason for the lack of provisions on jurisdiction agreements is that after the conflict between the Harter Act and the English general maritime law, the principles of liability were the central focus of the international delegates to the Hague conference. Since originally the application of the Hague Rules was conducted coherently, there were no need for jurisdictional provisions. Eventually, it became relevant whether the Rules allowed forum clauses or did they violate Article 3(8) of the Hague Rules, since carriers were starting to use forum clauses for their personal gain to look for the most beneficial forum in terms of compensation for damages or other advantages based on legal doctrines of different legal systems.[240]

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[236] Alexander von Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force,* (Kluwer Law International 2005) 95

[237] Johan Scheling (rapporteur), 'Freedom of Contract and Carriage of Goods – Report from the London Seminar 20 to 21 February 2004, 1, 4 http://folk.uio.no/erikro/WWW/cog/Report.pdf accessed 29 January 2019

[238] Alexander von Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force,* (Kluwer Law International 2005) 95-96

[239] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 186

[240] Alexander von Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force,* (Kluwer Law International 2005) 89

The Hamburg Rules, however, regulate where the claimant may file legal actions. The options presented in the Convention allow the claimant to commence proceedings in places that have a genuine link with the contract of carriage and its performance. However, these provisions created resistance among carriers in fear that cargo consignees would utilize those jurisdiction options, and accordingly, override the jurisdiction clauses in carriers' bills of lading. This explains some of the reluctance of the major shipping nations to ratify the Hamburg Rules. Therefore, the courts in these states that have refrained from joining the Hamburg Rules must rely on their national laws in assessing the enforceability of the contested agreement.[241]

3.3.1 The Rotterdam Rules – A future solution for jurisdiction disputes?

The Rotterdam Rules provides a uniform and modern legal regime regarding carriage of goods contracts and all the relevant elements connected to them. The Convention offers a modern alternative to the earlier maritime conventions, by providing a legal framework that contains many technological and commercial developments that have taken place within sea transport since the adoption of the earlier conventions. The focus of the Convention is on the contractual issues related to the carriage of goods that includes an international sea leg, with the possibility of involving also other modes of transport.[242]

The Rotterdam rules takes a role that goes beyond liability issues and it has been designed to be a Convention to provide a unified regulation of contracts for the international carriage of goods wholly or partly by sea.[243] Although, the Rotterdam Rules pursue to create a unified system for contracts of carriage, there will be different interpretations regarding the provisions of the Rules. Regrettably, the risk of 'forum-shopping' lies in the non-mandatory nature of the jurisdiction and arbitration provisions of the Convention. Since some states may choose to opt-out of these provisions of the Rotterdam Rules[244], it seems unlikely that there will be uniform rules on jurisdiction and arbitration for all the states parties to the Convention. Consequently, since the courts of different states are not obligated to follow the decisions

[241] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 261-262

[242] UNCITRAL, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 2008 <http://www.uncitral.org/uncitral/uncitral_texts/transport_goods/2008rotterdam_rules.html> accessed 15 January 2019

[243] Ilian Nikolaev Djadjev, *'Law and Practice of the Obligations of the Carrier over the Cargo, the Hague Visby Rules'*, PhD Thesis, (2016) *University of Groningen* 65

[244] Rotterdam Rules Article 14 and 15

of other state's national courts, the parties to the contract of carriage are free to 'forum shop' for a jurisdiction where it is more likely for the court to provide them a favorable ruling.[245]

Although, the Rotterdam Rules does seem to provide some clarification to jurisdiction issues within sea transport, the Convention has not yet been ratified by many countries.[246] Neither the UK nor Finland has signed the Convention. Since it takes 20 states to ratify the Convention in order for it to enter into force, and so far, only four states are parties to the Convention, it does not seem likely that the Convention will enter into force within the near future.[247]

3.3.2 Does the CMR precede EU law in jurisdiction matters?

The United Nations Convention on Contract for the International Carriage of Goods by Road[248] (hereinafter CMR) was drafted with the goal of unifying the regulations on international road transport.[249] Although, the CMR only applies to road transport, which is *per se*, out of scope of this research, the CMR is also applicable to ro-ro transports with trucks carried onboard a vessel, which is why it is essential that it is briefly covered in this thesis.

The CMR becomes applicable if at least one of the parties to the contract is from a Contracting State.[250] In case the parties being from non-Contracting States, they may incorporate the CMR to be the law applicable in their contractual relations with a paramount clause.[251] The CMR is one of the few transport conventions that contains mandatory regulations on jurisdiction issues, and thus it precludes the rules of the Brussels I on jurisdiction. According to article 31 of the CMR, the parties can only commence court proceedings in courts or tribunals within Contracting States. However, the parties may always bring actions in the courts mentioned in Article 31.1, regardless of having a jurisdiction agreement referring to another court.[252] Under Article 31, these other courts are where:

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[245] Theodora Nikaki, 'The Carrier's Duties Under the Rotterdam Rules: Better the Devil You Know?', (2010) 35(1) *Tulane Maritime Law Journal* 1, 25

[246] From the Nordic countries, Denmark, Sweden and Norway have signed the Convention, however, none of them have yet to ratify it

[247] UNCITRAL, Status: United Nations Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea (New York, 2008), <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html> accessed 15 January 2019

[248] The United Nations Convention on Contract for the International Carriage of Goods by Road (Geneva 1961)

[249] Malcolm A. Clarke, ' International Carriage of Goods by Road: CMR' (5th edn, Informa Law 2009) 3

[250] CMR Article 1

[251] Malcolm A. Clarke, ' International Carriage of Goods by Road: CMR' (5th edn, Informa Law 2009) 16

[252] CMR Article 31.1

a) *"the defendant is ordinary resident, or has his principal place of business of the branch or agency through which the contract of carriage was made; or*

b) *the place where the goods were taken over by the carrier or the place designated for delivery is situated"*.[253]

Therefore, these rules precede an exclusive jurisdiction clause negotiated between the parties in carriage of goods contracts in situations where the CMR is applicable.[254] In fact, under the CMR, exclusive jurisdiction agreements do not exist at all.[255] The parties may include a non-exclusive jurisdiction clause into their contract, referring the possible dispute to a specific court, provided it being in a Contracting State[256], notwithstanding, the jurisdiction clause may not exclude the parties from resorting to the courts defined in the Convention. If the parties would attempt to include an exclusive jurisdiction clause into their contract of carriage by road, excluding all other courts, such a clause would be considered null and void.[257]

The jurisdiction clause may be in the transport document, consignment note, or in the actual carriage contract, or it may be included in a separate or subsequent contracts. However, in the latter case, the validity of the clause is determined according to the rules of national laws. Generally, the jurisdiction agreement negotiated between the sender and the carrier, will only be binding upon the receiver of the goods, the consignee, if he is aware of the existence of the clause.[258]

The conflict between Brussels I and the CMR becomes interesting in relation to the validity of a jurisdiction clause, since under Brussels I, a valid jurisdiction agreement must fulfil specific formal requirements. The CMR, however, does not contain any formal restrictions. Thus, even an oral jurisdiction clause, may be considered valid under the CMR.[259] However, as ECJ case law has demonstrated, it is not always obvious which of the provisions, the CMR or the Brussels I apply to the question of jurisdiction in a specific dispute.

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[253] CMR Article 31.1

[254] Thomas Kolster, 'Governing Law and Forum Clauses in Contracts of Carriage by Sea', ICMA XX: 25 September 2017, 1, 9 <http://icma2017copenhagen.org/Presentations/CS4_Kolster_1.pdf > accessed 23 January 2019

[255] Peter Mankowski, 'Relations with Other Instruments' in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law, Brussels I Regulation* (2nd rev. edn, Sellier European Law Publishers, 2012) 871

[256] CMR Article 41

[257] *Ibid*.

[258] Malcolm A. Clarke, ' International Carriage of Goods by Road: CMR' (5th edn, Informa Law 2009) 161

[259] Peter Mankowski, 'Relations with Other Instruments' in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law, Brussels I Regulation* (2nd rev. edn, Sellier European Law Publishers 2012) 871

In *TNT Express v AXA Versicherung*[260], the ECJ discussed the relevance of Article 71 of Brussels I in relation to matters governed by the CMR. In its ruling, the ECJ presented several conditions in order for the CMR to apply instead of the Regulation. According to the ECJ, in matters falling within the scope of the CMR, the rules of the Convention apply, provided that they *'are highly predictable, facilitate the sound administration of justice and enable the risk of concurrent proceedings to be minimized and that they ensure, under conditions at least as favorable as those provided for by the Regulation, the free movement of judgments in civil and commercial matters and mutual trust in the administration of justice in the European Union'*.[261] In its ruling, the ECJ introduced a set of conditions that need to be fulfilled in order for the Convention to apply. National courts must observe, whether these requirements are fulfilled when being faced with deciding whether to apply the provisions of the CMR or the Brussels I on a specific matter.[262]

The carriage contract may include an arbitration clause conferring competence on an arbitration tribunal if the clause provides that the tribunal shall apply the CMR.[263] However, it can be argued, that the courts mentioned in Article 31 have jurisdiction in addition to the arbitral tribunal. Accordingly, the plaintiff could select whether to bring actions in a court or to initiate arbitration proceedings. However, such thinking would be in conflict with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[264] (hereinafter the New York Convention), which states that courts shall refer the parties to arbitration in case a valid arbitration agreement exists, and thus cannot continue reviewing the dispute in a court of law.[265]

Since the CMR is only applicable in carriage of goods by road, with the exception of roro-transport by sea, it is not a key convention from the point of view of this thesis, thus, further emphasis shall not be placed upon discussing it.

[260] Case C-533/08, *TNT Express v AXA Versicherung* [2010], I-4107
[261] *Ibid*., para 56
[262] Jan Aminoff, 'Article 71 of the Brussels Regulation and the application of transport law conventions in the light of some judgments of the European Court of Justice', (2014) 6 *Tidskrift utgiven av Juridiska Föreningen I Finland (JFT)* 420, 433
[263] CMR Article 33
[264] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York 1958)
[265] New York Convention Article II

3.4 Jurisdiction and choice of law – from choosing the governing law to choosing the proper forum

In contracts for the international carriage of goods, in addition to choosing the proper forum, choosing the applicable law is essential. The generally recognized main principle is that the parties to the contract may choose the law applicable to their contractual transaction. However, if the parties have not included a conflict of law clause into their contract of carriage, then the applicable law will be decided based on national rules of the forum state. Therefore, by choosing the proper jurisdiction may also have consequences in relation to the law applicable to the contract in question.[266]

The basic rule of conflict of laws is that the conflict of law rules used to determine a choice of jurisdiction matter are the rules of the forum, *lex fori*. Accordingly, a question of *forum non conveniens* in an action in England, is decided based on the conflict of law rules of the UK. However, when determining, whether a jurisdiction clause is valid and should be given effect to, the court must evaluate, which law and forum the carriage has the closest and most real connection with. As with jurisdiction rules, it is useful to have uniform conflict of law rules.

The Convention on the Law Applicable to Contractual Obligations[267] (hereinafter Rome Convention), followed by the Rome I has harmonized the choice of law rules in contractual matters for all EU Member States.[268] Rome I is directly applicable to contractual obligations in civil and commercial matters, however, arbitration and jurisdiction agreements are excluded from its scope of application.[269] The Rome I establishes party autonomy for all contracts falling under the scope of the Regulation[270], including carriage of goods[271]. Additionally, contracts of carriage of goods are specifically regulated under the Rome I, so that if the parties have not chosen a governing law for the contract of carriage, *'the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt of the place of delivery or the habitual residence of the consignor is also situated in that country*.

[266] Regina Asariotis, 'Contracts for the Carriage of Goods by Sea and Conflict of Laws: Some Questions Regarding the Contracts (Applicable Law) Act 1990' (1995) 26(2) *Journal of Maritime Law and Commerce* 293, 293
[267] The Rome Convention on the Law Applicable to Contractual Obligations (Rome 1980)
[268] William Tetley, 'Jurisdiction Clauses and Forum Non Conveniens in the Carriage of Goods by Sea' in Martin Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 248
[269] Rome I Article 1.2 (e)
[270] *Ibid*., Article 3
[271] *Ibid*., Article 5

If those requirements are not met, the law of the country where the place of delivery as agreed by the parties shall apply'[272].

However, the Rome I shall not prejudice the application of other international conventions, which the Member State has acceded to before the adoption of the Regulation.[273] Accordingly, the Maritime Conventions are still applicable in relation to carriage of goods by sea. Additionally, the Rome I provides that based on overriding mandatory provisions regarding the safeguarding of a state's public interests, such as its political, social or economic organization, the national laws of that state take precedence over the Regulation.[274]

3.5 The priority of transport conventions under the Brussels I Recast

Knowledge of EU law is vital when engaged in transactions between EU Member States. Although, the Brussels I has the highest priority when it comes to hierarchy of norms within jurisdiction matters, the Regulation does not automatically supersede certain matters on transport law. Article 71 of the Brussels I establishes the priority order between the Regulation and any transport law convention containing provisions on jurisdiction and enforcement of judgments, which the EU Member States have entered into.[275] However, Article 71 does not apply retroactively, thus, any convention on jurisdiction that a Member State has become a party to before the Regulation entered into force, will continue to have effect.[276] This provision is significant in relation to transport law conventions, since some of the conventions, for example, the Arrest Convention[277], the CMR and the Hamburg Rules comprise regulations on jurisdiction. Since, the Hague Rules and Hague-Visby Rules do not address jurisdiction issues, states parties to either of these Conventions, or both of them, must combine the substantive rules of the Convention with the jurisdiction provisions of the Brussels I.[278]

This connection with Brussels I and transport law conventions becomes interesting in relation to jurisdiction clauses. The conventions may not limit the freedom to include jurisdiction clauses into transport contracts, which are drafted in accordance with the Brussels I. Consequently, when the Brussels

[272] Rome I Article 5.1
[273] *Ibid*., Article 25
[274] *Ibid*., Article 9
[275] Jan Aminoff, 'Article 71 of the Brussels Regulation and the application of transport law conventions in the light of some judgments of the European Court of Justice', (2014) 6 *Tidskrift utgiven av Juridiska Föreningen I Finland (JFT)* 420, 420
[276] Brussels I Recast Article 73(3)
[277] International Convention Relating to the Arrest of Sea-Going Ships, (Brussels 1952)
[278] Hannu Honka, 'Jurisdiction and EC Law: Loss of or Damage to Goods' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*'(Kluwer Law International 2005) 268

I[279] prescribes rules on the incorporation of jurisdiction clauses into contracts, states may not apply national provisions in conflict with the provisions of the Regulation. Precedence of EU law in this event is essential, for example, when looking at the Nordic Maritime Code, which contains specific rules on jurisdiction when the carriage concerns one of the Nordic States, as explained in Chapter 2. Although, those rules are based on the Hamburg Convention, the Nordic States have not actually ratified the Convention, therefore, the provisions in the Nordic Maritime Code yield to the regulations on jurisdiction agreements within EU law.[280] However, had the Nordic States actually become parties to the Hamburg Convention, would the provisions of the Convention take precedence over the jurisdiction rules of the Brussels I.

This is a vital element, in cases when the carriage of goods takes place between an EU Member State and a Nordic country, since according to the Nordic Maritime Code jurisdiction provisions of the Code are mandatory, and yet, a party from another EU Member State can always rely on the jurisdiction rules of the Brussels I, thus, circumvent the mandatory provisions of the Code. This also means, that a jurisdiction clause, which fulfils the formal requirements of the Brussels Recast precedes mandatory provisions of national laws. For example, in case two parties domiciled in the Nordic countries enter into a jurisdiction agreement, in relation to carriage of goods, referring to the courts in England with English law being the governing law, the court in England will have jurisdiction, regardless of the Nordic Maritime Code referring to the courts within the Nordic States. Consequently, the UK Court would apply English law, in which case the Hague-Visby Rules would be applicable, instead of the mandatory provisions of the Nordic Maritime Code.

It is also important to remember that the jurisdiction provisions of the Brussels I Recast apply, regardless, of the parties being domiciled in a non-EU Member State as long as they have selected a Member State court to be the chosen forum.[281] However, as discussed in the prior chapter, when the carriage of goods is governed by the CMR, the provisions on jurisdiction in the Convention apply. Therefore, the parties may always initiate proceedings in one of the courts defined in the Convention, regardless of having an exclusive jurisdiction agreement referring to another court.[282]

[279] Including the rules of the Brussels and Lugano Conventions
[280] Hannu Honka, 'Jurisdiction and EC Law: Loss of or Damage to Goods' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*'(Kluwer Law International 2005) 269
[281] Brussels I Recast Article 25(1)
[282] CMR Article 31

Article 71 of the Brussels I provides an exception to the general rule that EU law takes precedence over other international conventions on jurisdiction, which the Member States have entered into. This order of priory is based on these specialized conventions being designed to deal with specific matters.[283] However, if a specialized convention fails to govern matters of jurisdiction, contained in the Brussels I, or if a specialized convention re-refers to the procedural law of the forum State, the Rules of the Brussels I supersede any forum State's procedural law based on the primacy of EU law.[284]

Article 71.2 is applicable when a specialized convention contains rules on jurisdiction. Without regard to the Regulation, a court in an EU Member State, which is a party to such a Convention, shall presume jurisdiction despite the defendant being domiciled in a country not party to the Convention. This is an exception to the general rule in Article 4 of the Brussels I Recast that the defendant can always be sued in the courts of his domicile.[285] Article 71 of the Brussels I can be defined as an integration clause meant to merge specialized conventions into the Brussels I. However, the concept of reference, as presented in Article 71.1 does not aim at full integration of specialized conventions into the Regulation, yet it resembles "*a fictitious implantation of single provisions from other conventions into the structure of the European regime of jurisdiction*".[286]

[283] Brussels I Recast Recital (35) of the preamble

[284] Peter Mankowski, 'Relations with Other Instruments' in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law, Brussels I Regulation* (2nd rev. edn, Sellier European Law Publishers, 2012) 869

[285] Jan Aminoff, 'Article 71 of the Brussels Regulation and the application of transport law conventions in the light of some judgments of the European Court of Justice', (2014) 6 *Tidskrift utgiven av Juridiska Föreningen I Finland (JFT)* 420, 423

[286] Peter Mankowski, 'Relations with Other Instruments' in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law, Brussels I Regulation* (2nd rev. edn, Sellier European Law Publishers, 2012) 869, 870

4 Are third parties bound by jurisdiction clauses in contracts for the carriage of goods by sea?

A contract of carriage of goods is drafted between two parties, the carrier and the shipper, cargo owner (a consignor or consignee). However, the definition of a contract of carriage and its legal implications vary depending on the international regulations as well as national laws, which apply to the contract in question.[287]

The following chapter presents the framework that surrounds the contractual international carriage of goods and the liability regimes in the field of sea transport. It will discuss the regulations on carrier liability and the shifting of responsibility between the parties connected with international sea carriage. A special interest shall be placed on the nature of the carriage contract and how it provides rights and obligations to a third party. Specifically, how does the liability system of international transport in relation to a contractual clause in a carriage contract affect the rights and obligations of parties' that are not parties to the original agreement?

4.1 The liability of non-contractual carriers and their legal status in relation to contractual clauses in bills of lading

Although, the contract of carriage is drafted between the shipper/receiver of the goods and the carrier, it is possible that in case of loss of or damage to the goods, the cargo owner's action is against a subcarrier who has actually performed the carriage but who is not a party to the contract. In such a case, it should be considered; is the forum clause applicable in the relationship between the shipper and the actual carrier, although, the actual carrier is not a contractual party to the contract of carriage, or is the claimant required to sue the actual carrier based on the provisions of the Maritime Conventions or national laws? Moreover, how is the legal position of the carrier's servants and assistants regulated, and does it differ from the position of a subcarrier in respect to contractual clauses in the bill of lading?

In order to discuss these issues, the legal status of the contracting carrier in comparison to the actual carrier based on different international and national regulations need to be reviewed. Additionally, the rules on whether the contracting carrier may assign part of his obligations to another party differ depending on which convention is applicable to the transportation contract, or whether EU law or national laws apply.

[287] Ilian Nikolaev Djadjev, *'Law and Practice of the Obligations of the Carrier over the Cargo, the Hague Visby Rules'*, PhD Thesis, (2016) *University of Groningen* 9

A marine cargo claim for damaged goods is based on *prima facie* liability, accordingly, the carrier is liable, if he does not deliver the transported goods safely and in time at the agreed destination[288]. The carrier is presumed liable for loss of or damage to the goods, if the shipper can evidence that when the carrier took over the goods they were undamaged, and that the damage occurred during the transport.[289]

Traditionally, the carrier's liability for the goods has been limited to the period from the moment when the goods were loaded onboard the ship's tackle until they were unloaded from the ship's tackle at the port of destination *(the tackle-to-tackle principle).*[290] The Hague and Hague-Visby Rules follow this principle, accordingly, the carrier's liability commences when the goods are loaded on board the vessel and ends when the goods are discharged from the ship.[291] Consequently, liability for damage to the cargo occurred before loading or after discharging falls outside the scope of application[292].[293]

However, according to the Hamburg Rules, the carrier is liable for the goods when the goods are in his possession already at the loading port area and not only when the goods are loaded onboard the vessel[294]. Consequently, the Hamburg Rules have extended the carrier's liability compared to the Hague Rules and Hague-Visby Rules.[295] The Rotterdam Rules go even further by extending the carrier's liability to the period when the goods are in his custody, which may be at the inland points of shipment and delivery, compared to the Hague, Hague-Visby and Hamburg Rules, which only apply in connection to the maritime operation. Consequently, the same rules and regulations will control the overall period of responsibility.[296]

4.1.1 The liability of actual carriers under International Conventions

Generally, the Conventions regulating carriage of goods by sea are based on contractual relationships and liability of the parties of the agreement. The Hague Rules and Hague-Visby Rules mainly regulate the liability of the contractual carrier but remain silent about the responsibilities of the actual performing

[288] Ralph de Wit, *'Multimodal Transport – Carrier Liability and Documentation'* (Informa Professional 1995) 332
[289] Alexander von Ziegler, 'The Liability of the Contracting Carrier', (2009) 44 *Texas International Law Journal* 329, 339
[290] Jan Ramberg, *'The Law of Transport Operators in International Trade'*,(Norstedts juridik 2005) 62
[291] The Hague and Hague-Visby Rules Article I (e)
[292] According to Article II of the Hague-Visby Rules, the carrier is responsible for the goods during loading, handling, stowage, carriage, custody, care and discharge
[293] Sze Ping-fat, *'Carrier's liability under the Hague, Hague-Visby and Hamburg Rules',* (Kluwer Law International 2002) 18
[294] The Hamburg Rules Article 4(1); the carrier is responsible for the goods while he is in charge of the goods at the port of loading, during the carriage and at the port of discharge
[295] Sze Ping-fat, *'Carrier's liability under the Hague, Hague-Visby and Hamburg Rules',* (Kluwer Law International 2002) 21
[296] Alexander von Ziegler, 'The Liability of the Contracting Carrier', (2009) 44 *Texas International Law Journal* 329, 334

carrier.[297] However, according to the Hague-Visby Rules, the carrier is liable for the faults of his servants and agents[298], although, the liability does not extend to independent contractors[299]. Consequently, if the carrier has contracted with another subcarrier to perform the transport or part of the transport, the Hague-Visby Rules would not be applicable in such a carriage.

The Hamburg Rules, in turn, draws a line between the contracting carrier and the actual carrier.[300] The Convention extends the liability of the contracting carrier also to the actions of the actual carrier.[301] The contracting carrier is responsible for the acts of the actual carrier and of his servants and agents performed within the capacity of their employment.[302]

The Rotterdam Rules introduces two new concepts, the performing party and the maritime performing party. Performing party is *"a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage -- to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control"*[303]. Accordingly, the carrier can contract any of the operations listed in the Rotterdam Rules to another party, that being an ocean carrier, an inland carrier, stevedoring company, a warehouse operator, in addition to an agent of the carrier, and independent contractor or a sub-contractor.[304] A maritime performing party is *"a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship"*[305]. Consequently, a maritime performing party may be an independent sea subcarrier if the contractual carrier has sub-contracted the sea transport to a sea carrier.[306]

The Rotterdam Rules has presented these two concepts in order to make multimodal transport more comprehensible. However, the legal position of these two actors differs. The maritime performing party

[297] The Hague and Hague-Visby Rules Article 1(a)
[298] The Hague-Visby Rules Article 4(2)(q)
[299] *Ibid*., Article 4 bis (2)
[300] The Hamburg Rules Article 1
[301] Tomotaka Fujita, 'The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications', (2009) 44 *Texas International Law Journal* 349, 366
[302] The Hamburg Rules Article 10
[303] Rotterdam Rules Chapter I Article 1.6
[304] Ilian Nikolaev Djadjev, *'Law and Practice of the Obligations of the Carrier over the Cargo, the Hague Visby Rules'*, PhD Thesis, (2016) *University of Groningen* 67
[305] Rotterdam Rules Chapter I Article 1.7
[306] Ilian Nikolaev Djadjev, *'Law and Practice of the Obligations of the Carrier over the Cargo, the Hague Visby Rules'*, PhD Thesis, (2016) *University of Groningen* 67

is subject to the same obligations and liabilities as the contractual carrier.[307] However, the performing parties, although being mentioned in the Rotterdam Rules, are not incorporated in the liability regime of the Rules. Accordingly, the obligations and liabilities of a performing party under the Rotterdam Rules are to be established based on the relevant applicable law.[308] Therefore, whether the performing carrier under the Rotterdam Rules would be bound by a contractual clause in the carriage contract would be assessed under national law rules.

In many legal systems, the relationship between the cargo owner and the actual carrier/subcarriers would fall under the definition of a contract. For example, Article 35 of the CMR states, *"the rules of the contract apply to relations between successive carriers"*[309]. In such cases, the jurisdiction clause in the original carriage contract would become binding upon the actual carrier or subcarriers, regardless of them acting as independent contractors. However, Article 34 of the CMR states that a succeeding carrier becomes a party to the contract of carriage, by accepting the goods and the consignment note.[310] This was also confirmed by the Supreme Court of the UK in *British American Tobacco Denmark A/S and others v Kazemier Transport BVBritish American Tobacco Switzerland SA v H Essers Security Logistics BV and another*[311]. The Court ruled that a jurisdiction clause included in the carriage of goods contract of the contractual carrier was not binding upon the successive carriers, because they were not aware of the existence of the clause, since it was not included in the consignment note. It would have been unjust to hold the successive carriers bound by terms and conditions that they had not agreed to.[312]

Although, this case concerned carriage of goods by road, it emphasizes the principle that a contract is based on mutual agreement of the parties, and therefore, a party cannot be bound by a contractual clause that he is not aware of. However, had the jurisdiction clause be included in all the consignment notes, including the ones of the successive carriers, the clause would have been binding upon all the parties, who had become aware of the terms in the consignment note.

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[307] Rotterdam Rules Chapter V Article 19.1
[308] Ilian Nikolaev Djadjev, *'Law and Practice of the Obligations of the Carrier over the Cargo, the Hague Visby Rules'*, PhD Thesis, (2016) *University of Groningen* 68
[309] CMR Article 35
[310] *Ibid*., Article 34
[311] *British American Tobacco Denmark A/S and others v. Kazemier Transport BVBritish American Tobacco Switzerland SA v. H Essers Security Logistics BV and another* [2015] UKSC 65
[312] *British American Tobacco Denmark A/S and others v. Kazemier Transport BVBritish American Tobacco Switzerland SA v. H Essers Security Logistics BV and another* [2015] UKSC 65, at Press Summary of the Supreme Court of the United Kingdom, 28 October 2015, https://www.supremecourt.uk/cases/docs/uksc-2013-0258-press-summary.pdf, accessed 6 February 2019

In some instances, the act of the actual carrier of taking possession of the cargo might constitute an agreement between the cargo owner and the actual carrier. In addition, an agreement between the contractual carrier and the actual carrier to provide for the carriage might be seen as a contract for the benefit of a third party, being the cargo owner. Furthermore, the consignee might be provided rights based on the bill of lading issued by the actual carrier, in addition to the bill of lading issued by the contractual carrier.[313] However, if the relationship between the contractual carrier and the actual carrier is considered a contract for the benefit of a third party, then the question on whether the cargo owner can sue one of the carriers will be founded on contract or tort, depending on the relevant national laws.

4.1.2 The Nordic view on contracting carriers compared to actual carriers

In the Nordic Maritime Code of 1994, the Nordic States adopted a view based on the Hamburg Rules[314] that the contracting carrier is responsible for the goods while transit. Therefore, the carrier may not avoid liability in case of damage to the goods by using a subcontractor to transport the goods for parts of the voyage. The main rule is that the contracting carrier is liable for the damage occurred while the goods are in the possession of an actual carrier unless the contracting carrier has specifically agreed with the shipper that a certain part of the transport is taken care of by a named actual carrier. In such a case, the contractual carrier must prove that the damage occurred while the goods were in the possession of the actual carrier.[315] Accordingly, the claimant has a right to a direct action against the actual carrier. However, the claimant may not be placed in a position that is worse than in which he would be had the contractual carrier personally performed the transportation.[316] Notwithstanding, if the information regarding the actual carrier is not included in the contract of carriage, the contracting carrier and the actual carrier are both liable for the damage and their liability is joint and several for the damage occurred to the cargo.[317] Accordingly, in order for the contractual carrier to avoid liability for damage occurred while the goods were in the custody of a subcarrier, the carrier needs to include the necessary information concerning the subcarrier in the carriage contract. Notwithstanding, the FMC does not allow the contractual carrier to avoid liability completely by including an 'identity-of-carrier clause' to the carriage

[313] Hannu Honka, 'Jurisdiction and EC Law: Loss of or Damage to Goods' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*'(Kluwer Law International 2005) 272
[314] The Hamburg Rules Article 10
[315] The Finnish Maritime Code Chapter 13 Section 35-36
[316] Finnish Government Bill, HE 62/1994, p. 50
[317] The Finnish Maritime Code Chapter 13 Section 37

contract.[318] The determinant matter is who has provided the promise to carry the goods from the place of dispatch to the place to destination.[319]

According to the FMC, '*a bill of lading signed by the master of the vessel carrying the goods is deemed to have been signed on behalf of the carrier'*[320]. Accordingly, once the bill of lading is signed by the master of the vessel, or on behalf of the master, the contracting carrier is considered liable. Even though the master of the ship is as an employee of the ship's owner, it no longer places liability solely on the owner of the vessel.[321]

The Finnish Supreme Court has reviewed the validity of an arbitration agreement in relation to third parties in an interesting case.[322] The case concerned a claim made by a third party against an insurance company for damages to the cargo caused by a vessel insured by the insurer. The third party claimed compensation directly from the insurance company after the company that owned the vessel had become insolvent. The insured party and the insurance company had agreed in their insurance contract that all disputes were to be resolved through arbitration in Norway, and the governing law was the law of Norway. The Finnish Supreme Court reviewed, whether a third party was bound by the arbitration agreement or whether the average adjuster was competent to provide a claims settlement. The Supreme Court held that the arbitration agreement was valid, and there was no cause for the agreement not to be binding on a third party claiming compensation directly from the insurance company founding its claims on the insurance agreement.

This case confirms the approach that a third party holds the same rights and obligations as the original parties to the contract. Additionally, the third party may not be granted better rights than the original parties, yet he can be hold bound by the terms of the original agreement. However, compared to the *British American Tobacco* case, discussed above, in this case the third party was not aware of the terms of the insurance agreement between the insured and the insurer, yet the Supreme Court held the terms of the insurance agreement to be binding upon a third party who had succeeded to the rights of the insured.

Judge Juha Häyhä presented his dissenting opinion in the Supreme Court ruling in question, which the author of this thesis agrees. According to judge Häyhä a fundamental principle of arbitration is that the

[318] Under the FMC, 'identity of carrier clause' may be considered void, since it contradicts with the rules of Chapter 13 Section 35
[319] William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 2457
[320] Finnish Maritime Code Chapter 13 Section 45
[321] William Tetley, Q.C, 'The Demise of the Demise Clause', (1999) 44 *McGill Law Journal* 807, 846
[322] Finnish Supreme Court, KKO:2007:39

arbitration agreement is only binding upon the parties to the agreement. In this case, the claimant is not a party to the agreement in question. The claimant has based his right in this case to the provision in law that concerns the so called 'direct action', which is meant to protect the rights of the party that has suffered harm, for example, when the insured defendant has become insolvent. Moreover, the arbitration agreement is to be looked at as a separate agreement from the main contract, therefore, the claimant cannot be considered to be bound to the arbitration agreement against his will.

Although, this case did not concern an arbitration agreement in a bill of lading, it still refers to the judicial practice regarding the legal status of a third party and whether such a party is bound by the terms of the original agreement. Notwithstanding, it can be considered unjust that a third party claimant can be bound by terms that he has not been aware of in the first place. Had the discussed case been a case of having the arbitration clause in a bill of lading, it would have been more likely that the third party had been aware of the existence of the arbitration clause. However, since the claimant was not a party to the arbitration agreement, nor aware of its existence, the decision of the Supreme Court seems controversial, especially compared with the general view of the Nordic courts, that clauses in a carriage contract primarily bind the parties to the contract, the cargo owner and the contractual carrier[323].

4.1.2.1 Is the carrier vicariously liable?

The carrier is to a significant extent liable for the negligence of other persons in respect to the care of the cargo. Accordingly, the carrier is considered at fault for the neglect of the carrier's servants or assistants. Otherwise, the carrier could avoid liability, since in practice the carriage of the goods is often performed by others. The carrier may even be considered liable for the negligence of persons, who are not directly employed by him, such as harbor workers engaged in loading and discharging of the goods.[324]

The Finnish Supreme Court has assessed the validity of a jurisdiction clause and the general jurisdiction of Finnish courts in a case that concerned whether a jurisdiction clause in a bill of lading was binding on the assistants of the carrier, such as stevedores.[325] In this case, a Jurisdiction clause in the bill of lading pointed all disputes to be resolved in the Court of London or New York. The Supreme Court referred to prior case law according to which a jurisdiction clause in a bill of lading can assign the case to be resolved

[323] Peter Wetterstein, 'Jurisdiction and Conflict of Laws under the New Rules on Carriage of Goods by Sea' in Hannu Honka (ed*) The New Carriage of Goods by Sea – The Nordic Approach including Comparisons with Some Other Jurisdictions* (Institute of Maritime and Commercial Law, (Åbo Akademi University 1997) 329
[324] Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *'Scandinavian Maritime Law: The Norwegian Perspective'* (4th edn, Universitetsforlaget 2017) 352
[325] Finnish Supreme Court, KKO:1991:111

in a foreign court[326]. The Supreme Court stated that the rights and liabilities of the carrier's assistants in relation to the bill of lading holder are assessed by the terms of the transport document. Accordingly, the clauses in the bill of lading are also binding upon the carrier's assistants. Therefore, the Supreme Court held the jurisdiction clause to be valid in relation to the carrier's assistants, and the claim for compensation filed by the insurance company as the consignee's successor against the carrier's assistants could not be reviewed in Finnish courts, instead the case was referred to the courts designated in the jurisdiction clause.

Evidently, the judicial practice in Finland has adopted the approach that the carrier's assistants can be held accountable similarly as the contractual carrier, and the terms of a valid bill of lading are binding on such operators. FMC provides the same protection for anyone the carrier is vicariously liable. Accordingly, those persons are afforded the same defenses and limits of liability, which are available to the carrier.[327] This group of people also includes stevedores, regardless of them having been employed by the carrier or by someone on the cargo side.[328] However, this protection originating from the Maritime Conventions; the Hague-Visby Rules[329] and the Hamburg Rules[330], does not extend to independent contractors. Although, it could be criticized whether the provision of the Hamburg Rules, *per se*, excludes independent contractors or just does not mention them.

The FMC does not specifically exclude independent contractors, like the Hague-Visby Rules, but it does emphasize covering persons the carrier is responsible for. However, if the carrier has hired a subcontractor to perform part of the carriage and according to the FMC, the contractual carrier is liable for the actions of the actual carrier, then could that be interpreted to also provide protection for the actual carrier under Chapter 13 Section 32? In this respect, the nature of the agreement between the contractual carrier and the subcarrier becomes decisive in determining whether the subcarrier is operating as an employee in acting under the supervision of the contractual carrier, or whether the contract defines him as an independent subcontractor.

The approach towards the legal status of the carrier's servants, assistants and subcontractors, parties not-party to the carriage contract, has varied between different jurisdictions. In civil law, it is allowed to

[326] Finnish Supreme Court, KKO:1971-II-89
[327] Finnish Maritime Code Chapter 13 Section 32
[328] Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, *'Scandinavian Maritime Law: The Norwegian Perspective'* (4th edn, Universitetsforlaget 2017) 423
[329] Hague-Visby Rules Article 4 bis
[330] Hamburg Rules Article 7

make a stipulation in a contract for the benefit of a third party. In contrast, under common law, at least in theory, the principle of *privity of contract* makes it difficult to extend any rights or obligations based on the carriage contract to anyone other than to the parties of the original carriage contract. However, with the use of a Himalaya clause, the contractual protection is provided for parties employed by the carrier, who otherwise would be outside of the protection provided by the carriage contact.[331]

The Himalaya clause was designed for the benefit of a third party, not party to the actual carriage contract, so that the third party could benefit from the contractual terms of the bill of lading.[332] The Himalaya clause emerged from the decision of the English Court of Appeal in *Adler v Dickson* (*The Himalaya*).[333] A passenger on the S.S Himalaya, Mrs. Adler, was injured when a gangway fell. Since the passenger ticket contained a non-responsibility clause exempting the carrier, Mrs. Adler brought actions against the master, Mr. Dickson and the boatswain.

The Court of Appeal stated that in a carriage of goods contract, the carrier is allowed to stipulate terms for those whom he has hired to perform the contract. However, in this case, the Court found that the passenger ticket did not expressly or impliedly benefit servants or agents, and consequently, Dickson could not benefit from the exemption clause. However, after this decision, Himalaya clauses that were specifically drafted for the benefit of third parties begun to be included in bills of lading and these clauses contained specific wording in order to avoid misunderstandings.[334] Moreover, a Himalaya clause that provides all the exemptions, defenses and limitations of liability to the carrier's servants, agents and subcontractors that would be accessible for the carrier himself includes the right to rely on a jurisdiction clause included in the bill of lading.[335]

The protection provided by the Himalaya clause can now be found in the FMC Chapter 13 Section 32. However, as discussed above, in order to ensure proper protection to all the parties, including subcontractors, incorporating a Himalaya clause to the carriage contract can provide protection and exemptions more satisfactory than the statutory protection of the FMC.

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[331] Jan Ramberg, *'The Law of Transport Operators in International Trade'*,(Norstedts juridik 2005) 111
[332] William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 1853
[333] *Adler v Dickson* (The Himalaya) [1954] 2 Lloyd's Rep 267
[334] William Tetley, *'Marine Cargo Claims'*, (4th edn, volume 2, Thomson-Carswell 2008) 1855
[335] Robert Force and Martin Davies, 'Forum Selection Clauses in International Maritime Contracts' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force* (Kluwer Law International 2005) 45

4.1.3 The legal status of actual carriers under English law

At common law, the carrier's contractual responsibility for the transported goods is determined by the contract of carriage.[336] In order for the contractual carrier to delegate some of his tasks to another carrier/subcarrier, his authority to do so must either be agreed in the contract of carriage or it can be implied, as for example, in the case of 'through' bill of lading. However, the contractual carrier may not contract with another carrier on less favorable terms binding upon the cargo owner.

Moreover, the contractual carrier remains liable to the cargo owner based on the original carriage contract and the actual carrier is merely seen to perform part of the transport on behalf of the contractual carrier.[337] Accordingly, the actual carrier acts as an agent for the contracting carrier. However, if the contracting carrier signs the bill of lading as an agent for the actual carrier, then the actual carrier is responsible for damage taking place during his performance of the contract. Therefore, it is customary to add in the bill of lading a clause exempting the contracting carrier from liability for the acts of the actual carrier, if the actual carrier is performing as an independent contractor. In case of tortious liability, the cargo-owner can only file a claim against the actual carrier in possession of the cargo if the loss of or damage to the cargo occurred while the actual carrier was acting as the performing carrier for that particular voyage.[338]

Under English law, when a claimant has a right to sue a third party, such action will be an action in tort. Due to the doctrine of *privity of contract*, contracts can only have legal consequences to those who are parties to the contract.[339] Therefore, if the cargo owner has a claim against the subcarrier, then this action must be founded in tort.[340]

The regulations on tort claims are mainly based on national laws. Many legal systems allow an action in tort between the parties to the contract or between a party to the contract and the other party's servant, agent, subcontractor, or basically anyone who executes part of the other party's contractual obligations.[341] Although jurisdiction clauses normally only refer to the parties to the contract, it is possible for the forum clause to include other proceedings as well, such as covering actions in tort. In

[336] Sze Ping-fat, *'Carrier's liability under the Hague, Hague-Visby and Hamburg Rules',* (Kluwer Law International 2002) 15
[337] *Ibid*., 25
[338] *Ibid*.
[339] Hague-Visby Rules Article 4 bis
[340] Ralph de Wit, *'Multimodal Transport – Carrier Liability and Documentation'* (Informa Professional 1995) 440
[341] *Ibid*., 45

Continental Bank v Aekos Compania Naviera[342] the English Court of Appeal accepted a jurisdiction clause in a contract to be covering also tort actions referring to the subject of the agreement.[343]

Liability in tort based on a breach of duty to take reasonable care to avoid damage or loss, may arise in a situation where there is no contractual relationship between the parties in question. In a tortious claim, the claimant must be able to prove physical loss or damage to the cargo, thus, he cannot sue based on delay. Moreover, solely the owner of the cargo, or the one entitled to possession of the goods at the time when the negligent act occurred, has a claim.[344]

The UK has incorporated the Hague-Visby Rules into its national law COGSA 1992, which confirms the Rules to have force of law in international carriage of goods performed under a bill of lading. However, the substantive rights of the parties are regulated by the Hague-Visby Rules and case law, since COGSA does not contain provisions on carrier liability in relation to subcarriers.[345] Therefore, in order to provide defenses for independent contractors, a Himalaya clause must be added to the carriage contract. Generally, Himalaya clauses have been upheld by English courts, provided the bill of lading states an exact intention to protect the third party, in addition to the carrier contracting as an agent for the third party with an authority to do so.[346] The Contracts (Rights of Third parties) Act 1999 enables third parties to enforce contractual terms. However, the Contracts Act pursues to avoid colliding with the operation of the COGSA by providing that it shall confer no rights on third parties when regarding shipping contracts covered by the 1992 COGSA.[347]

An important case in relation to the applicability of a forum clause in relation to third parties is *the Mahkutai* case[348], which concerned whether shipowners, who were not parties to the bill of lading, could rely on an exclusive jurisdiction clause under the Himalaya clause. The cargo owner had contracted with a charterer to provide for the carriage and delivery of cargo. The bill of lading contained a Himalaya

[342] *Continental Bank v Aekos Compania Naviera* [1994] 1 WLR 588
[343] Trevor C. Hartley,*'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 164
[344] James Gosling, Rebecca Warder and Tessa Jones Huzarski 'Chapter 17 England & Wales' in James Gosling and Tessa Jones Huzarski (eds) *The Shipping Law Review*, (3rd edn, Law Business Research 2016) 174
[345] Tove Dickman Haugvaldstad, 'The Carrier's Liability for Sub-carriers and the Sub-carrier's liability: A Comparative Study Between Scandinavian and English law and the Rotterdam Rules', LLM Thesis, (2011) *University of Oslo* 13
[346] Jonathan Campbell and Kristy MacHardy (Campbell Johnston Clark), 'Carriage of Goods by Sea in the UK' (2018) Lexology <https://www.lexology.com/library/detail.aspx?g=1543018e-1bf3-40c1-af05-bd1cf190504b> accessed 14 February 2019
[347] Martin Dockray, *'Cases and Materials on the Carriage of Goods by Sea'* (3rd edn, Routledge Cavendish Publishing 2004) 129
[348] *The Mahkutai* [1996] AC 650

clause that extended all the rights and obligations granted to the charterer to their agents. In addition, the bill of lading included an exclusive jurisdiction clause. The charterer contracted with the shipowner to provide for the transport with a secondary bill of lading, which did not include a jurisdiction clause. Afterwards, the cargo owner filed a claim against the shipowner due to damage that had occurred to the cargo during transit. However, the actions were brought in a different jurisdiction than the one designated in the original bill of lading, because the cargo owner argued that since the bill of lading was concluded between the cargo owner and the charterer, the shipowner was not party to the original contract of carriage and, therefore, could not rely on the jurisdiction clause in the bill of lading

The court found that, although, the Himalaya clause in the bill of lading referred to third parties having the right to rely on any 'exceptions, limitations, provision, conditions and liberties benefiting the carrier', it did not include the exclusive jurisdiction clause, since an exclusive jurisdiction agreement represents a mutual agreement, and it does not confer a benefit to only one party. The court stated that a contract must be concluded to provide a commercial effect.[349] The *Mahkutai* case maintained the English *privity of contract* doctrine that the rights and obligations of the agreement only apply to the parties of the original agreement.[350]

Another common law method that may create the same outcome as a Himalaya clause is the doctrine of *bailment on terms*. It is based on voluntarily taking possession of the goods with an obligation towards the owner to provide for the goods on terms, to which the owner of the goods has agreed. This doctrine is not dependent on the existence of a contract between the cargo owner and the person in possession of the goods. Therefore, in case there is damage to the cargo, the doctrine may be invoked by a subcarrier or a stevedore, who has taken possession of the cargo but does not have a contractual relationship with the owner of the goods.[351]

In *the Pioneer Container*[352], the English Privy Council held that when the contractual carrier has subcontracted the goods to a subcarrier with the authority of the cargo owner, thus, based on that authority the cargo owner was bound by the terms of the sub-bailment, including an exclusive jurisdiction clause

[349] All Answers ltd, 'The Mahkutai – 1996' (Lawteacher.net, January 2019) <https://www.lawteacher.net/cases/the-mahkutai.php?vref=1> accessed 18 January 2019

[350] The Court of Rotterdam followed this Ruling in the case *Rio Taku*, (19 March 2015), where a subcarrier pursued to rely on an arbitration clause in the bill of lading issued by the contractual carrier. The court found the clause not to be binding between the consignee and the subcarrier.

[351] Martin Dockray, *'Cases and Materials on the Carriage of Goods by Sea'* (3rd edn, Routledge Cavendish Publishing 2004) 141

[352] *The Pioneer Container Case* [1994] 2 AC 324

included in the contract of sub-bailment. The jurisdiction clause was considered valid even though the cargo owner was unaware of the existence of the jurisdiction clause, but under the terms of the bailment was considered to have consented to the terms of the sub-bailment.[353]

4.1.4 Should a maritime claim be founded in tort or in contract?

The legal rules on jurisdiction and applicable law differ, whether the action is founded in tort or in contract. The general rule on tort claims is that they are filed in the court, where the tortious act was committed or the damage occurred, as compared to contractual claims, which are normally sued in the place of residence of the respondent or of the place, where the performance should have taken place.[354]

The parties to the contract may include a jurisdiction clause into their contract of carriage, however, such clause is not applicable in relation to the action in tort against a third party. As presented above, this raises a concern for the enforceability of the forum clause in the contract of carriage, if the owner of the cargo does not have a contractual claim against the carrier, but a tortious action against the subcarrier. However, most states (at least continental states) have rules in their contract laws rendering the contracting party liable for the fault or neglect committed by a third party, while performing part of the contractual party's obligations.[355] Accordingly, the contracting party is liable for any damage caused by his servants, employees, agents, or independent contractors similarly as if he had caused the damage himself. [356]

However, founding a tort-based claim against a third party due to damaged cargo places the third party in a worse position than the contractual party, since depending on the relevant national law, the subcarrier may not necessarily rely on the limits of liability provisions. The most common way to provide protection against tort-based claims is to allow the carrier's servants and agents to resort to the exclusions and limitations available to the carrier under the mandatory liability regime[357].[358]

The Nordic States have adopted a rule that places all persons for whom the carrier is vicariously liable under the same liability protection provisions as apply to the carrier.[359] As compared to English law,

[353] Andrew Bell, *'Forum Shopping and Venue in Transnational Litigation'* (OUP 2003) 288
[354] Ralph de Wit, *'Multimodal Transport – Carrier Liability and Documentation'* (Informa Professional 1995) 53
[355] In Finland, this provision exists in the Law of Damages (Tort Law) (412/1974) Chapter 3 Section 1
[356] Ralph de Wit, *'Multimodal Transport – Carrier Liability and Documentation'* (Informa Professional 1995) 70
[357] See e.g. Hague-Visby Rules Article 4bis and Hamburg Rules Article 7 and 10.2
[358] Frank Smeele 'The Maritime Performing Party in the Rotterdam Rules 2009', (2010) 1-2 *European Journal of Commercial Contract Law* 72, 75
[359] The Finnish Maritime Code Chapter 13 Article 32

under the doctrine of *bailment on terms*, the shipowner may resort to defenses under his own sub-bailment contract that he has concluded with the contractual carrier when he is faced with a tort-based liability claim from the cargo interests.[360]

4.1.5 How does EU law interpret the position of an actual carrier, in reference to a maritime claim founded in tort or in contract?

According to EU law, a person domiciled in an EU Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.[361] However, in a dispute relating to a contract, the proper forum is be the place of performance of the obligation in question[362], or in case of carriage of goods, the place where the services were provided or should have been provided.[363] The selection of the correct provision may become relevant, for example, when the seller enters into a carriage contract with the carrier, but the ownership/liability for the cargo transfers to the buyer/consignee during transport, at which point the goods are damaged, therefore, the buyer/consignee might have a claim against the carrier in tort or in contract. It is likely that in such case, the claimant can bring an action in accordance with Article 7.1 of the Brussels I, however, the matter is not entirely obvious.[364]

The meaning *'in matters relating to a contract'* under the Brussels Convention was discussed by the ECJ in *Réunion Européenne v Spiethoff's Bevrachtingskantoor BV and the Master of the Vessel Alblasgracht*[365]. The case concerned a carriage of goods from Melbourne via Rotterdam to Rungis, France with a bill of lading issued by PTY Limited (hereinafter RCC) in Sydney. Once the goods were delivered at their place of destination in Rungis to the consignee, Brambi Co, it was detected that the goods were damaged during the transit. Brambi received compensation for the damage from the insurance company, who then brought actions against RCC, which had issued the bill of lading, against Spliethoff's Bevrachtingskantoor BV, which had actually performed the carriage and against the Master of the Vessel Alblasgracht V002, as representative of the owners and charterers of the vessel that had performed the carriage. The claim was issued in Rungis, since the damage had been uncovered there.

[360] Frank Smeele 'The Maritime Performing Party in the Rotterdam Rules 2009', (2010) 1-2 *European Journal of Commercial Contract Law* 72, 75
[361] Brussels I Recast Article 7.2
[362] *Ibid*., Article 7.1(a)
[363] *Ibid*., Article 7.1(b)
[364] Hannu Honka, 'Jurisdiction and EC Law: Loss of or Damage to Goods' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*'(Kluwer Law International 2005) 272
[365] Case C-51/97, *Réunion Européenne v Spiethoff's Bevrachtingskantoor BV and the Master of the Vessel Alblasgracht* [1998] ECR-6511

However, disagreement arose regarding whether the Court in Rungis had jurisdiction under the Brussels Convention.

The ECJ stated in respect of the phrase *'matters relating to contract'* does not cover a situation when there is no obligation that is freely assumed by one party towards the other.[366] Moreover, the bill of lading evidences no contractual relationship freely entered into between Brambi and splienthoff's Bevrachtingskantoor BV with the Master of the vessel Alblasgracht V002. Therefore, the ECJ found that there was no agreement between the consignee, Brambi, and the actual performing carriers, under the definition of the Brussels Convention.[367]

The ECJ stated that when the consignee detects the goods to be damaged during route, and once his insurers who have subrogated to his rights after compensating him, seek redress for the damage relying on the bill of lading covering the carriage against the defendant, who the plaintiff considers being the actual carrier, is to be reviewed as an action in tort, delict or quasi-delict under Article 5(3) of the Brussels Convention.[368]

Although, the case above did not concern a jurisdiction clause, it is an essential ruling when reviewing the relationship between the claimant and the actual carrier. Thus, if the consignee and the actual carrier have not entered into a contractual relationship, then in reference to a dispute regarding a jurisdiction clause, the claim would not be based on contract, but on tort, which again results in the conflict between filing an action in tort, which cannot raise obligations on a third party. Accordingly, in such a situation, the parties would not be bound by the jurisdiction clause, since they would not be considered being contractual parties.

However, this line of reasoning becomes conflicting, when compared with the interpretations of the ECJ, for instance in *Corect Maritime GmbH v Handelsveem BV*[369] where the Court found that a jurisdiction clause in a bill of lading between a shipper and a carrier is binding upon a third party bearer of the bill of lading, if he has succeeded to the rights and obligations of the shipper. If he has not succeeded to all the rights, it must be determined whether he has accepted the jurisdiction clause.[370] By accepting the clause, the third party bearer of the bill of lading becomes party to the contract, accordingly, bound by

[366] *Ibid*., para 17
[367] *Ibid*., paras 19-20
[368] *Ibid*., para 26
[369] Case C-387/98 *Coreck Maritime v Handelsveem* [2000] ECR I – 9362, I – 9378
[370] Hannu Honka, 'Jurisdiction and EC Law: Loss of or Damage to Goods' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*'(Kluwer Law International 2005) 276

the agreement. Therefore, arguing that sea transport third part will never be bound by a jurisdiction clause in a carriage contract that he is not a party to, would not be accurate. As presented above, the actual carrier may become bound by the carriage contract or its stipulations by signing the bill of lading. However, it is necessary to acknowledge the possible conflicts of having a subcarrier perform part of the transport and to take it into consideration when negotiating the terms of the original contract of carriage.

The ECJ has also discussed the meaning of Article 5.1(b)[371] in a very recent case in *Zurich Insurance plc and Metso Minerals Oy v Abnormal Load Services (International) Ltd*[372] that concerned whether Finnish courts have international jurisdiction under Article 5.1(b) of the Brussels I. The case regarded a multimodal carriage of goods contract between a Finnish company and a British carrier for the delivery of goods from Finland to the UK. After the goods were lost during transport, the Finnish shipper and the insurer of the cargo filed a claim for damages against the carrier in a Finnish court. The Finnish Supreme Court asked for a preliminary ruling from the ECJ on how are the place or places where the service is provided to be determined in accordance with Article 5.1(b) when involving a carriage of goods contract between Member States in which the goods are transported in several stages with different means of transport.

When presenting his opinion on the case, the Advocate General referred to the prior cases of *Rehrer*[373] and *Flightright and Others*[374], in which the ECJ held that in case of air transport of passengers, the courts in the Member States of both the place of departure and the place of arrival of the aircraft had jurisdiction. The ECJ founded its decision on these cases, *inter alia*, to the principles of foreseeability and risk assessment.[375] The ECJ found that the place of dispatch is closely connected with the main part of the services, namely to receive the goods, to load them adequately and to protect them so that they are not damaged. Consequently, the incorrect performance of the contractual obligations in the place of dispatch may lead to incorrect performance of the contractual obligations at the place of destination. Accordingly, in addition to the place of delivery, the place of dispatch of the goods is to be regarded as a place where

[371] The case concerned the interpretation of Article 5.1(b) of the old Brussels I Regulation, which is transformed into Article 7.1(b) in the Brussels Recast Regulation. For the sake of clarity, in respect to this case, the article numbering used in the ECJ decision is also used in this paper

[372] Case C-88/17 *Zurich Insurance plc and Metso Minerals Oy v Abnormal Load Services (International) Ltd,* [2018] EU:C:2018:558

[373] Case C-204/08, *Rehrer* [2009] EU:C:2009:439

[374] Case C-274/16, C-447/16 and C-448/16, *Flightright and Others* [2018] EU:C:2018:160

[375] Opinion of advocate general Tanchev, delivered on 10 April 2018, C-88/17 *Zurich Insurance plc and Metso Minerals Oy v Abnormal Load Services (International) Ltd*

the services are provided, ensuring a close link between the carriage contract and the court having jurisdiction.

This solution follows the principle of predictability, since both the applicant and the defendant can identify the courts of dispatch and delivery of the goods as courts where actions may be brought. The ECJ held that in respect of a contract for the carriage of goods between Member States in multimodal transport means, both the place of dispatch and the place of delivery of the goods establish places where transport services are provided for the purposes of Article 5.1(b) of the Brussels I.[376]

4.2 Who is the claimant – When does the risk pass from the seller to the buyer?

Although a contract primarily has two parties, in a carriage of goods contract, there are normally three parties involved in the transaction, the consignor (the shipper), the carrier and the consignee (the receiver of the goods). However, it is the sale of goods contract behind the carriage contract that defines who is responsible for providing the carriage, accordingly, negotiating the carriage contract.[377]

In the sales contract, the parties to the agreement – seller and buyer – choose an international delivery term to govern the transportation of the cargo, an Incoterm[378], which defines when the liability for the goods purchased transfers from the seller to the buyer. For example, in CIF[379], the seller is responsible for delivering the goods to the buyer, thus, the seller contracts with the carrier to provide for the transportation of the goods. As compared to in FOB[380], the buyer is responsible for providing the carriage, consequently, the buyer negotiates the carriage contract with the carrier. Therefore, in FOB, the buyer is a party to the carriage contract, while the seller only performs as an agent for the buyer when assisting in the transportation of the goods. Notwithstanding, it is the seller's responsibility to hand over the cargo to the carrier.[381]

[376] Case C-88/17 *Zurich Insurance plc and Metso Minerals Oy v Abnormal Load Services (International) Ltd,* [2018] EU:C:2018:558, paras 20-25

[377] The Finnish Sale of Goods Act Section 7 states that the seller delivers when the goods are handed over to the buyer, or in case of international carriage, once the goods are handed over to the carrier. If the sales contract is governed by the CISG, according to Article 67, the seller delivers once he hands over the goods to the first carrier for transmission to the buyer

[378] Incoterms are delivery terms published by the International Chamber of Commerce (ICC), that describe which one of the parties is liable for delivering the goods; for taking care of the costs of the transportation; and the moment when the risk transfers from the seller to the buyer. See eg. Lauri Railas, *'Incoterms 2010'* (2nd edn, Helsingin Kamari Oy 2017)

[379] CIF (cost, insurance and freight) – The seller delivers when the goods pass the ship's rail at their port of shipment, in addition, the seller provides and pays for cost and freight during the transport

[380] FOB (Free on board) – the seller delivers when the goods pass the ship's rail at the named port of shipment

[381] Lena Sisula-Tulokas, *'Kuljetusoikeuden perusteet'*, (3rd edn, Talentum 2007) 19

When the parties choose CIF or CFR[382] -terms to govern the transportation, the seller negotiates the carriage contract with the carrier, and although, the buyer is not a party to the actual contract of carriage, he is a beneficiary of the carriage contract through the bill of lading representing the goods. Once the risk passes from the seller to the buyer, the buyer becomes liable for the cargo, and accordingly, can bring actions against the carrier in case of loss of or damage to the goods.[383]

The bill of lading allows the buyer to claim the goods from the carrier, and grants the buyer the right to sue the carrier in case the goods are not incompliance with the transport document. Since the bill of lading evidences the transport contract, generally, once the jurisdiction clause is included in the bill of lading, the buyer may rely on the clause in question, in addition to being bound by it, as long as it does not violate the mandatory provisions provided by international conventions or by the applicable national laws.[384]

Notwithstanding, it may be difficult for the buyer to bring an action against the carrier, whom the seller has contracted a contract of carriage. Often the carrier and the seller are domiciled/registered in the same country, thus, placing the buyer at a disadvantage for having to sue the carrier in a foreign court of law. However, the Hamburg Rules describe the places where the claimant is allowed to take actions against the carrier[385]. Since the Convention forbids proceedings in states other than the ones mentioned in the Hamburg Rules, unless agreed by the parties after the dispute had arisen[386], a jurisdiction clause drafted in advance pointing to another state than the ones in the Convention, would be considered void.[387] However, since none of the Maritime Conventions contains provisions on the legal position of the consignee in relation to jurisdiction clauses[388], the issue must be reviewed based on the relevant national laws, in addition to EU law.

[382] CFR (cost and freight) – the seller delivers when the goods pass the ship's rail at their port of shipment, in addition, the seller provides and pays for cost and freight during the transport
[383] Jan Ramberg, *'The Law of Transport Operators in International Trade',*(Norstedts juridik 2005) 114
[384] Jan Ramberg, 'Incoterms 2000 – The necessary link between contracts of sale and contracts of carriage', (2008) 58 (1-2) *Zbornik Pravnog Fakulteta u Zagrebu* 35, 43
[385] The Hamburg Rules Article 21
[386] *Ibid*., Article 21.5
[387] *Ibid*., Article 21.3
[388] It is questionable if the parties to the carriage contract decide to derogate from the Rotterdam Rules with a jurisdiction clause under Article 7, whether under Article 80(5)(a) such a derogation could be binding on the consignee in case he gives his consent to be bound by the derogation

4.2.1 The rights and obligations of a third party bill of lading holder under civil law

In principle, a jurisdiction clause is binding only between those who have agreed to it.[389] However, a special feature of contracts of carriage of goods is that, at least in civil law legal system, it is an agreement for the benefit of a third party, since normally the original party to the carriage contract (shipper) is a different person than the consignee, who receives the goods.[390] Therefore, once the consignee receives the bill of lading, he replaces the position of the shipper in the carriage contract, and is granted the rights and obligations of the shipper. Based on this right, in case the goods delivered have been damaged during transit, the buyer can bring actions against the carrier under the carriage contract. In which case, the buyer is also bound by the jurisdiction clause included in the bill of lading and must file his claim in the chosen court.[391]

However, there has been some differences among the national laws of some civil law countries regarding the priority of the carriage contract to the bill of lading. A transfer of the bill of lading to a third party creates a new legal relationship between the carrier and the third party holder of the transport document, the consignee. This new relationship is governed mainly by the terms of the bill of lading, instead of the carriage contract.[392] Notwithstanding, since in international sea transport the bill of lading is an evidence of contract, thus, it represents a promise to carry the goods and contains the necessary terms for the carriage, including a possible forum clause.[393]

The transfer of the bill of lading to the consignee also gives rise to the application of the mandatory liability provisions of the maritime conventions to the contract of carriage. Accordingly, the application of the mandatory provisions introduces the conclusive evidence-rule, which except for the Hague Rules, is contained in all the carriage of goods by sea conventions. However, some civil law states, *inter alia*, continental European countries, apply an extended conclusive evidence rule, which states that the carrier may not invoke clauses included in the carriage contract against the consignee, if such clauses differ from

[389] Trevor C. Hartley, *'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 175
[390] Alexander von Ziegler, 'Jurisdiction and Forum Selection Clauses in a Modern Law on Carriage of Goods by Sea' in Martin Davies (ed) *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honor of Robert Force*, (Kluwer Law International 2005) 86
[391] Trevor C. Hartley, *'International Commercial Litigation, Text, Cases and Materials in Private International Law'* (Cambridge University Press 2009) 176
[392] Frank Smeele, 'Bill of Lading Contracts under European National Laws (Civil law approaches to explaining the legal position of the consignee under bills of lading)' in D.R. Thomas (ed) *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009) 253
[393] Ralph de Wit, *'Multimodal Transport – Carrier Liability and Documentation'* (Informa Professional 1995) 233-234

the clauses in the bill of lading. Consequently, the bill of lading becomes decisive when reviewing whether the consignee is bound by the jurisdiction clause.[394] This continental European approach protects the rights of the third party consignee by allowing him to rely on the terms of the bill of lading, without the fear of becoming bound by obligations that he neither has been aware of nor has agreed to.

In Finland, the legal position of a bill of lading holder is regulated in the FMC according to which: "*The bill of lading determines the conditions for the carriage and delivery of the goods in respect of the relationship between the carrier and any holder of the bill of lading, not being the contracting shipper"*[395]. In addition, it states that terms, which are not included in the bill of lading, may not be invoked against a bill of lading holder, unless the bill of lading contains a specific reference to such terms.[396] Consequently, if a jurisdiction clause is included in the carriage contract, in order for the clause to be binding upon the consignee, it must be included in the bill of lading or the clause must be referred to in the transport document.[397] Accordingly, the rightful holder of the bill of lading is entitled to sue the carrier in the forum described in the bill of lading in case of damage or loss of cargo. Although, in principle the transfer of rights does not affect the liability of the original shipper.[398] Notwithstanding, when the FMC is applicable to the transport, the rightful holder of the bill of lading can always rely on the jurisdiction provisions in the FMC, and file a claim in one the courts defined in the Code.[399]

Furthermore, the provisions of the FMC regarding sea transport, including provisions on forum selection, do not mandatorily apply to charterparties. Although, the provisions apply compulsorily to a bill of lading issued pursuant to a charterparty when the bill governs the relation between the carrier and the holder of the bill of lading.[400] However, when a bill of lading has been issued pursuant to a charterparty, incorporating a jurisdiction clause, in order for the clause to be considered valid, the bill of lading must contain an express reference stating the clause to be binding on the holder of the bill of lading. Otherwise,

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[394] Frank Smeele, 'Bill of Lading Contracts under European National Laws (Civil law approaches to explaining the legal position of the consignee under bills of lading)' in D.R. Thomas (ed) *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009) 254

[395] Finnish Maritime Code Chapter 13 Section 42.3

[396] *Ibid*.

[397] See Finnish Supreme Court decision KKO:1933-I-80, in which an arbitration clause in the chartering agreement was also binding upon the receiver of the bill of lading.

[398] Ulla von Weissenberg and Linda Ojanen, 'Finland' in David Lucas (ed) Shipping and International Trade Law: Jurisdictional Comparisons (2nd edn, Thomson Reuters 2015) 179

[399] Finnish Maritime Code Chapter 21 Section 4

[400] *Ibid*., Chapter 13 Section 3

the carrier may not rely on the clause against a bill of lading holder, who has acquired the transport document in good faith.[401]

The FMC, however, does not contain provisions on a sea waybill to determine the conditions of carriage and delivery, similarly as defined for bills of lading. Moreover, a sea waybill is considered *prima faci*e evidence of the contents of the carriage contract[402]. Accordingly, the carrier is to include a reference to the terms in the sea waybill. Notwithstanding, even if there is no reference to the chosen terms, the carrier is permitted to establish that a specific term has been otherwise incorporated into the carriage contract. However, since the consignee does not need to have a copy of the sea waybill[403], the carrier should include a remark of the chosen terms in the transport document, in order to avoid confusion. Nevertheless, the consignee is bound by the terms of the carriage contract even without a reference to the term in question in the sea waybill. If once the consignee becomes aware of the incorporated terms declines to take delivery of the goods, the carrier can demand the contracting shipper to follow the terms of the carriage contract. Therefore, it is vital for the contracting shipper to inform the consignee of the terms of the carriage contact.[404] Evidently, bills of lading are more favorable in relation to the position of the third party receiver of the transport document as compared to sea waybills.

4.2.2 Can a third party bill of lading holder rely on a jurisdiction clause in the bill of lading under common law?

Originally, two principles of English common law prevented the consignee from suing the carrier due to damage of cargo. Firstly, the doctrine of *privity of contract* denied the possibility for a third party to sue under a contract he was not a party to, regardless of the contract providing a benefit on that third party. Secondly, damages for breach of contract could only be assessed in relation to the loss suffered by a contractual party, while the loss occurred to a third party was not recoverable.[405] Over time, the judicial

[401] Ulla von Weissenberg and Linda Ojanen, 'Finland' in David Lucas (ed) Shipping and International Trade Law: Jurisdictional Comparisons (2nd edn, Thomson Reuters 2015) 178
[402] Finnish Maritime Code Chapter 13 Section 59.2
[403] Finnish Government Bill, HE 62/1994, p. 56
[404] Ilkka Kuusniemi, 'Shipping Terms' in Hannu Honka (ed) *New Carriage of Goods by Sea – The Nordic Approach including Comparisons with some other Jurisdictions* (Institute of Maritime and Commercial Law, (Åbo Akademi University 1997) 261
[405] Binnaz Topaloglu *'The Validity of Jurisdiction and Arbitration Clauses as Against Third Party Holders of Bills of Lading – A Comparative Study Under French, English and EU law'*, (Dissertation prepared and presented within the context of International Commercial Law Lecture, King's College London) 453, 475

practice has pursued to create methods to allow a third party claimant to seek remedy from the carrier.[406] However, these attempts have not been sufficient to override the doctrine of *privity of contract*, thus legislative measures were needed.[407]

The basis for a cargo claim under English law is a breach by the carrier to exercise proper due diligence in making the vessel seaworthy or a failure to properly care for the cargo. Under the COGSA 1992, the person who has the right to sue the carrier is the 'lawful holder' of the bill of lading. This can be either the consignee or the endorsee in possession of the bill of lading.[408] In *Standard Chartered Bank v Dorchester LNG (2) Ltd*[409], the Court of Appeal found that a bank as a pledgee of the goods under a letter of credit can also be classified as a lawful holder of the bill of lading due to being entitled to the goods, and thus, possessing the right to file a claim against the carrier.

Section 2 of COGSA transfers all the rights of the shipper to the consignee once he becomes the holder of the bill of lading. Consequently, the consignee is granted all the rights based on the contract of carriage as if he had been a party to that contract.[410] In *East West Corp*[411], the court confirmed that the '*rights of suit'* meant all the rights arising under the contract. According to Section 5 of COGSA, a contract of carriage is evidenced by a bill of lading, accordingly, the bill of lading must contain all the necessary terms of the carriage contract.[412]

The consignee has the right to bring actions against the carrier based on the contract of carriage, and the carrier can rely on a jurisdiction clause in the bill of lading against the consignee, who might be pursuing to sue the carrier in the court of destination, which is normally the place of residence of the consignee.[413] Once the consignee is granted all the rights of the shipper, when he becomes the holder of the bill of

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[406] See e.g. *Donohue v Armco Inc and Others* [2001] UKHL 64, in which the court found that a clause in a bill of lading can be uphold if there is consent, actual or deemed, to the clause. Available at: House of Lords publications, Session 2001-02 <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/dono-1.htm> accessed 16 February 2019

[407] Binnaz Topaloglu *'The Validity of Jurisdiction and Arbitration Clauses as Against Third Party Holders of Bills of Lading – A Comparative Study Under French, English and EU law'*, (Dissertation prepared and presented within the context of International Commercial Law Lecture, King's College London) 453, 475

[408] James Gosling, Rebecca Warder and Tessa Jones Huzarski 'Chapter 17 England & Wales' in James Gosling and Tessa Jones Huzarski (eds) *The Shipping Law Review*, (3rd edn, Law Business Research 2016) 173-174

[409] *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2015] 1 Lloyd's Rep 97

[410] Carriage of Goods by Sea Act 1992 Article 2.1

[411] *The East West Corp* [2003] EWCA Civ 83

[412] Martin Dockray, *'Cases and Materials on the Carriage of Goods by Sea'* (3rd edn, Routledge Cavendish Publishing 2004) 118

[413] Binnaz Topaloglu *'The Validity of Jurisdiction and Arbitration Clauses as Against Third Party Holders of Bills of Lading – A Comparative Study Under French, English and EU law'*, (Dissertation prepared and presented within the context of International Commercial Law Lecture, King's College London) 453, 457 http://dergipark.gov.tr/download/article-file/7066 accessed 29 January 2019

lading, the shipper loses his right to sue the carrier in case he has suffered loss.[414] However, this generally has little implication, since once the consignee becomes the owner of the cargo, the damaged goods become his loss. Consequently, it is the consignee, who usually files a claim against the carrier for cargo damage. Furthermore, under Article 3 of COGSA, the liabilities of the shipper will only transfer to the third party holder of the bill of lading, once he takes or demands delivery of the goods or makes a claim against the carrier based on the 'contract of carriage'.[415]

4.2.3 Has the ECJ clarified the position of the third party bill of lading holder?

The legal status of a third party holder of a bill of lading has been discussed by the ECJ in several cases. In *Tilly Russ v Nova,* the ECJ found that, if the jurisdiction agreement in the bill of lading fulfills the requirements of Community law regarding the original contractual parties, and if based on the relevant national law the consignee holding the bill of lading is granted all the rights, and similarly is subject to all the obligations of the shipper presented in the bill of lading, the jurisdiction agreement will be binding on the holder of the bill of lading regardless of whether the third party holder of the bill of lading has accepted the jurisdiction clause in the original carriage contract.[416]

In *Castelleti v Trumpy,* the ECJ referred to the decision in *Tilly Russ* confirming that in case a jurisdiction clause in a bill of lading in considered valid under Article 17 of the Brussels Convention between the shipper and the carrier, it can also be relied upon against a third party holding the bill of lading, since the holder of the bill of lading succeeds to the shipper's rights and obligations.[417] The Court continued that the validity of the jurisdiction clause must be determined based on the relationship between the original parties to the carriage contract.[418] If the shipper of the goods has been aware of a usage in the country of shipment, the third party receiver of the bill of lading becomes bound by the usage of the original parties, even though he has not been aware of such usage, when he succeeds to the rights and obligations of the shipper.[419] This decision confirms the position that the third party holder of the bill of lading is bound by the terms in the bill of lading when he steps into the shoes of the shipper, and is given all the same rights and obligations, applicable to the shipper.

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[414] Carriage of Goods by Sea Act 1992 Article 2.5
[415] *Ibid*., Article 3
[416] Case C-71/83 *Tilly Russ v Nova* [1984] ECR 2417–2436, paras 25-26
[417] Case C-159/97, *Castelletti v Trumpy* [1999] ECR I-1597, para 41
[418] *Ibid*., para 43
[419] Yvonne Baatz, 'Enforcing English Jurisdiction Clauses in Bills of Lading' (2006) Academy Publishing 727, 734, <https://journalsonline.academypublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/399/Citation/JournalsOnlinePDF> accessed 14 February 2019

The Coreck Maritime v Handelsveem confirmed *the Tilly Russ* decision, and added that in case under the applicable national law, the third party, who was not party to the original carriage contract, did not succeed to the rights and obligations of the shipper, it must be established, whether he accepted the jurisdiction clause in question.[420] However, the ECJ did not define, which *'relevant national law'* it referred to. Instead, it merely stated that it is not for the ECJ to determine because it falls within the jurisdiction of the national court, which must apply its rules of private international law.[421] The ECJ refused to express what rules of substantive law are to be applied in case the relevant national law does not provide an answer to whether a third party succeeds to the rights and obligations of the shipper.[422]

As can be seen, the ECJ has adopted an approach that the terms of the bill of lading bind a third party receiver of the bill of lading, when he succeeds to the rights and obligations of the original shipper or accepts the jurisdiction clause in the bill of lading. This approach seems to clarify the status of the third party, since otherwise the position of consignee in a carriage contract would seem to be questionable at least. In addition, it protects the rights of the carrier, since accordingly, the carrier can rely on a jurisdiction clause in the bill of lading against the third party beneficiary.

From the point of view of international transport, the position of the bill of lading holder is extremely important, due to the peculiar nature of the carriage contract. Clarifying this position provides certainty to the overall efficiency of international carriage. Not to mention from the point of view of contract law, if the terms of the carriage contract would automatically lose their validity in relation to the third party, it would create a serious concern for the fundamental principle of contract law, *pacta sund servanda*, since the carrier could not rely on the negotiated contract but would be forced to rely on statutory regulations instead.

[420] Case C-387/98 *Coreck Maritime v Handelsveem* [2000] ECR I - 9362–I - 9378 para 27
[421] *Ibid*., para 30
[422] *Ibid*., para 31

5 Conclusion

Transport law clearly is a unique area of law that is regulated by numerous international and national norms. Therefore, selecting the correct forum in case of dispute is not always simple and many things need to be considered when filing a maritime claim based on a breach of carriage contract.

Although, the application of jurisdiction clauses in carriage of goods contracts can enhance the overall efficiency of international transport, still several things need to be considered when choosing the most suitable forum for the interests of all the parties, and to ensure that the chosen court will enforce the clause in question. Presuming that all jurisdiction agreements are enforceable will create unnecessary costs and is a waste of time and resources, when several proceedings might take place before the actual case even gets heard. Consequently, it is vital for the parties to review the relevant legal sources regarding international maritime transport, in addition to the national laws of the states of the parties to the transaction, not to mention the significance of EU regulations in jurisdiction issues.

The differences between common law and civil law jurisdictions in relation to the validity of forum clauses and the regulations regarding the chosen venue must be kept in mind. While common law countries tend to focus on freedom of contract and the intention of the parties, the courts in civil law countries tend to rely on the mandatory provisions rather than on contractual terms. Correspondingly, civil law states are inclined to interpret the wording of the conventions literally, while common law jurisdictions grant more flexibility in their interpretation regarding the terms of the carriage contract. However, this difference is problematic, since it might raise conflicts regarding which rules to apply.

The common law doctrine of *forum non conveniens*, becomes relevant when the carriage contract has a connection to a common law country. However, the adoption of EU regulations has significantly restricted the use of the doctrine in disputes connected with EU law. Notwithstanding, especially when the chosen forum is in a non-Member State, the *forum non conveniens* might become applicable. In contrast, the civil law doctrine of *lis pendens* contained in EU law protects the competence of the chosen forum to review the validity of the jurisdiction clause, consequently, the will of the parties is protected and there is no longer the fear of having two parallel proceedings continuing for long.

The differences in the interpretation of jurisdiction clauses in different legal systems will continue to be a problem within international carriage of goods by sea. Leaving too much room for courts' discretion, might risk an impartial and fair trial, not to mention avoid predictability and limit party autonomy if the

court chooses to ignore the forum clause that the parties have freely negotiated. Freedom of contract as a fundamental principle of contract law is meant to provide the parties the possibility to choose the terms of their contract, although, some mandatory regulations are still needed to protect the weaker parties. However, creating unified rules that all the parties are obligated to follow, does not support the basic purpose of contract law.

The mandatory jurisdiction provisions in the Hamburg Rules and in the Nordic Maritime Code aimed at protecting the weaker party, the shipper, with the fear of possessing lesser bargaining power than the carrier, however, there is no longer a need for such protection in international carriage. Nowadays, more often the parties are major companies comprising equal bargaining power, and therefore, the case should depend on the negotiations between two equally powerful entities engaged in commercial transactions with one another. If there were no mandatory jurisdiction provisions, there would be no conflicting norms in this regards, and consequently, party autonomy would flourish. There is no question, however, that the rights of consumers in carriage contracts need to be protected. Accordingly, establishing mandatory provisions in the transport conventions for consumers seems proportionate. However, limiting the freedom of the parties to select a forum that is most suitable for their needs seems extreme.

Since the field of international transport has been regulated by several different regimes, like the Maritime Conventions, EU law and national laws, not to mention 'hybrid' regimes, like the Nordic Maritime Codes, it is no surprise that such multitude of different regimes creates uncertainty regarding the applicable provisions, which in turn increases costs in case of possible dispute for the proper forum. Consequently, there clearly is a need for clarification in this area of law. The EU has attempted to provide harmonized jurisdiction rules to be applicable between EU Member States, which take precedence against conflicting norms, such as the rules of the Nordic Maritime Code. However, the provisions that alter the applicable jurisdiction rules to be applied based on the international conventions, instead of EU law, such as the CMR or the Hamburg Rules, can make the selection of the correct norm even more confusing, since they precede the application of the EU regulations in this regard. Consequently, based on this analysis, the answer to the first research question: "Should jurisdiction clauses be incorporated to carriage of goods by sea contracts?", the answer is yes. However, merely incorporating such clauses into carriage contracts does not seem to be enough when there are mandatory provisions that override the wording of the agreement. Therefore, there evidently is need for further legislative actions as well.

Due to the special nature of a carriage contract connecting more than two parties is what makes the terms of the carriage contract complex. A contractual term in the carriage contract does not necessarily create

rights and obligations to a third party, or alternatively it might bind him to contractual terms that he has not agreed to. Although, in most instances it does seem that third parties, such as actual carriers and subcarrier, can also be bound by the terms of the carriage contract. Consequently, the answer to the second research question: "Can non-contractual carriers rely on a jurisdiction clause in the carriage contract?", the answer is for the most parts yes. However, in order to secure the rights of all the parties, contractual and non-contractual, all the necessary information regarding possible subcarriers should be included in the carriage contract and further transferred into the bill of lading. Consequently, all the relevant terms of the carriage contract should be included in the bill of lading in order to avoid misunderstandings and uncertainty among third parties that are not parties to the original carriage contract.

Furthermore, the rights of the consignee need to be protected, since he has no bargaining power when it comes to the terms of the carriage contract, other than to refuse to accept the delivery all together. However, by incorporating all the necessary contractual terms to the bill of lading seems to cover this need for protection. Once the consignee becomes the holder of the transport document containing all the terms of the carriage, he can choose to accept the delivery with the incorporated carriage terms or choose to refuse delivery. Consequently, the consignee (buyer) will resort to the seller to discuss possible compensation depending on the terms of the sales agreement. Since both of the legal systems discussed in this thesis, with some exceptions, have confirmed that the consignee becomes bound by the terms of the bill of lading once the bill of lading is transferred to the consignee, which can be seen to have the effect of assigning him the rights of the shipper. Accordingly, the consignee enters into the position of the shipper and is granted the rights and obligations of the shipper. Since this approach has also been verified by the ECJ, it can be confirmed that the answer to the third research question: "Is a third party bill of lading holder, generally the consignee, bound by the terms of a jurisdiction agreement that he has not agreed to nor has been aware of?", is yes.

In conclusion, it is the argument presented in this thesis that by denying the contractual parties the opportunity to include valid jurisdiction clauses into carriage contracts through mandatory provisions is a restriction on the fluent functioning of international sea transport. Therefore, by allowing the parties to freely negotiate the terms of their contract and to choose whether to incorporate jurisdiction clauses into their carriage contracts would enhance the fundamental purpose of contract law, and accordingly, the smooth sailing of carriage of goods by sea.

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